The "List of Cases" indicates all Full Opinion cases for each volume of U. S. Reports. Cases noted by an asterisk (*) are not included in our current filming. We attempt to film all records and briefs for each case. If some of the records or briefs are not available, we must postpone filming until the bound edition of Records and Briefs is available. In order to avoid a long delay we are shipping this volume incomplete. We expect to ship the missing cases within twelve months.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1910.

No. [redacted]64.

THE ATLANTIC, GULF AND PACIFIC COMPANY, APPELLANT AND PLAINTIFF IN ERROR,

vs.

THE GOVERNMENT OF THE PHILIPPINE ISLANDS.

APPEAL FROM AND IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

FILED SEPTEMBER 4, 1906.

(21,327.)

(21,327.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 249.

THE ATLANTIC, GULF AND PACIFIC COMPANY, APPELLANT AND PLAINTIFF IN ERROR,

vs.

THE GOVERNMENT OF THE PHILIPPINE ISLANDS.

APPEAL FROM AND IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

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COPY BOUND

1 R. G. Núm. 4195.

UNITED STATES OF AMERICA,
Philippine Islands.

In the Court of First Instance of the City of Manila.

No. 5180.

THE ATLANTIC, GULF & PACIFIC CO., Plaintiff,
versus
THE GOVERNMENT OF THE PHILIPPINE ISLANDS, Defendant.

Be it remembered by the present bill of exceptions that in the above entitled case the following proceedings were had in the court of First Instance of Manila.

On the 22*th* day of January 1907 the plaintiff filed the following complaint in the Court of First Instance.

Title.

Comes now the plaintiff and for cause of action against the defendant alleges:

I.

That the plaintiff is a corporation of West Virginia, duly authorized to transact business in the Philippine Islands.

II.

That by authority of Act numbered 1,540 the plaintiff is authorized and empowered to bring this suit against the defendant.

III.

That on the 24th day of July, 1905, the plaintiff entered into a contract with the defendant for the making and construction
2 of certain improvements in the Port of Manila, more specifically set forth in the copy of said contract, plan and specifications of said improvements, hereto attached, marked respectively "A", "B" and "C" and made a part of this complaint; that thereafter the plaintiff proceeded with the work and construction of said improvements in compliance with the said contract, plan and specifications, and on the 1st day of May, 1906, had so far progressed in the construction of said improvements that the inside fill of the bulkhead as provided for in said contract plan and specifications was four feet above mean low water;

IV.

That on the said 1st day of May, 1906, and while the said improvements were in a condition as provided for in said contract, plan and

specifications, a section of about 200 feet in length of the said bulkhead and rock revetment was displaced by the pressure from the inside fill and moved a distance of about 20 feet into the waters of the Bay of Manila, and that through the opening thus caused there escaped into the Bay a large quantity of the fill that had been pumped behind the said bulkhead; that after the break in the bulkhead and rock revetment of May 1st, 1906, the plaintiff proceeded as rapidly in the repairing of the said bulkhead and revetment as it was permitted to do by the Officer in Charge representing the defendant, and in strict and immediate compliance with the orders received from the said Officer in Charge in that behalf; that thereafter and on the 18th day of May 1906, before the aforesaid break in the bulkhead and revetment had been or could have been repaired, a severe typhoon occurred in the Bay of Manila; that the said bulkhead and rock revetment, being without the support of the inside fill, which had escaped through the said break, were greatly damaged and completely destroyed for a distance of about 1,800 feet by the pressure of the rock revetment and the wind and waves from the outside acting against the bulkhead and revetment, which because of the escape of the heretofore noted fill, was without support from the inside; that during and after the destruction of the bulkhead and revetment, caused as last aforesaid, a large additional quantity of the inside fill escaped into the Bay of Manila.

V.

That thereafter, to-wit, on the 24th day of May, 1906, a supplemental contract was entered into by and between the plaintiff and defendant to repair the damages done to the said bulkhead and rock revetment by the break caused by the pressure of the inside fill on May 1st, 1906, as is more specifically set forth in the said supplemental contract, a copy of which is hereto attached, marked Exhibit "D" and made a part of this complaint.

VI.

That thereafter, to-wit, on the 25th day of May, 1906, it was agreed by and between the parties hereto that the damage caused to the improvements as heretofore set forth on the 18th and 19th days of May, 1906, was to be repaired upon the same terms and conditions as set forth in said contract of May 24th, 1906, marked Exhibit "D," as appears from copy of a letter of the Officer in Charge of said work hereto attached, marked Exhibit "E" and made a part of this complaint.

VII.

Plaintiff further alleges the fact to be that if the break in the bulkhead and rock revetment of May 1, 1906, caused as aforesaid by the pressure of the inside fill, had not occurred, that then no damage whatever would have been done to said improvements, bulkhead, rock revetment or fill by the typhoon of May 18th-19th, 1906, since the said bulkhead and rock revetment, when in the condition as provided for in said contract, plan and specifications, with the fill on

the inside always about even with the rock revetment on
4 the outside and both the fill and the rock revetment being about four feet above mean low water mark, would have been sufficiently strong to resist the force of the wind and waves.

VIII.

Plaintiff further alleges that under and by virtue of the said contracts and specifications hereinabove set forth, and in repairing the damage caused to the said improvements on May 18th-19th, 1906, the plaintiff has placed and used in the repair of the said damages 15,237 tons of rock and 116,000 cubic yards of fill, and has further paid out for labor for the making of said repairs, separate and apart from the placing of the said rock and fill, the sum of—P—10,768.58, and has further paid out the sum of —P—1,339.80 for sauali necessary in the making of said repairs.

IX.

That the agreed compensation according to the said contracts and specifications for the placing of said rock is P39,616.20, for the placing of the said fill the sum of P27,840.00, for labor the sum of P10,768.58, and for sauali the sum of P1,339.80, which said sums as aforesaid for rock, fill, labor and sauali should have been paid to the plaintiff by the defendant on or before the 1st day of January, 1907, as appears from the terms of the said contract marked Exhibit "A"; that payment of the said sums has been demanded by the plaintiff of the defendant, but that the defendant refuses to pay the same because it contends that under and by virtue of the terms of the said contracts and specifications the expense of the said repairs must be borne by the plaintiff;

Wherefore plaintiff prays judgment against the defendant in the sum of P79,564.58, as provided in said contracts.

Manila, January, 1907.

HARTIGAN, ROHDE & GUTIERREZ,
Attorneys for Plaintiff.

5 EXHIBIT "A."

This agreement entered into this twenty-fourth (24th) day of July, nineteen hundred and five, (1905) between C. McD. Townsend, Major, Corps of Engineers, United States Army, of the first part, and the Atlantic, Gulf and Pacific Company of West Virginia, of the second part, witnesseth, that, in conformity with the specifications hereunto attached, which form a part of this contract, the said C. McD. Townsend, for and in behalf of the Government of the Philippine Islands, and the Atlantic, Gulf and Pacific Company, do covenant and agree, to and with each other, as follows:

That the said party of the second part shall furnish the necessary plant and material, and shall do the work required by said specifications at the prices herein stipulated and expressed in Philippine currency, as follows:

For dredging and depositing Two Million (2,000,000) cubic yards, more or less, of material at twenty-four (24) centavos per cubic yard measured in cut.

For one hundred and ten thousand (110,000) tons, more or less, of rip-rap stone in place at two (2) pesos and sixty (60) centavos per ton of two thousand two hundred forty (2,240) pounds.

For Four thousand three hundred fifty (4,350) lineal feet, more or less of timber bulkhead in place at twenty (20) pesos per lineal foot.

For Seven hundred thirty-eight (738) cubic yards, more or less, of concrete in place at thirty (30) pesos per cubic yard.

All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by and inspector appointed on the part of the Government and such as do not conform to the specifications set forth in this contract shall be rejected. The decision of the Officer in Charge of Port Works as to quality and quantity shall be final.

6 The said Atlantic, Gulf and Pacific Company of West Virginia shall commence the work as per specifications hereto attached on or before the first day of August, nineteen hundred and five (1905) and shall complete the same on or before the first day of July, nineteen hundred and seven (1907).

If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgement of the Officer in Charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed shall have power, with the sanction of the Governor General of the Philippine Islands, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part; and, upon the giving of such notice all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the Government of the Philippine Islands; and the party of the first part shall be thereupon authorized, if an immediate performance of the work or delivery of the materials be in his opinion required by the public exigency, to proceed to provide for the same by open purchase, or contract, as prescribed in Act 231 of the Philippine Commission; provided, however, that if the party (or parties) of the second part shall by epidemics, freshets, or quarantine restrictions, force or violence of elements or other unavoidable cause of delay, and by no fault of his or their own, be prevented either from commencing or completing the work, or delivering the materials at the time agreed upon in this contract, such additional time may, with the prior sanction of the Governor General of the Philippine Islands, be allowed him or them in writing,

7 for such commencement or completion as in the judgment of the party of the first part, or his successor, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract.

but the same shall subsist, take effect, and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon.

If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specification as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Governor General of the Philippine Islands; provided, that no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

No claim whatever shall at any time be made upon the Government of the Philippine Islands by the party or parties of the second part for or on account of any extra work or material performed or furnished or alleged to have been performed or furnished under or by virtue of this contract, and not expressly bargained for and specifically included herein, unless such extra work or materials shall have been expressly required in writing by the party of the first part or his successor, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Governor General of the Philippine Islands.

8 The party of the second part shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material.

It is further understood and agreed that in case of failure on the part of the party of the second part to complete this contract as specified and agreed upon, that all sums due and percentage retained, shall thereby be forfeited to the Government of the Philippine Islands, and that the said Government of the Philippine Islands shall also have the right to recover any and all damages due to such failure in excess of the sums so forfeited, and also to recover from the party of the second part, as part of said damages, whatever sums may be expended by the party of the first part in completing the said contract, in excess of the price herein stipulated to be paid to the party of the second part for completing the same.

Payments will be made monthly to the said Atlantic, Gulf and Pacific Company, reserving ten (10) per cent from each payment until the whole work shall have been completed and accepted.

Neither this contract nor any interest therein shall be transferred to any other party or parties, and in the case of such transfer the Government of the Philippine Islands may refuse to carry out this contract either with the transferer or the transferee, but all rights of action for any breach of this contract by said Atlantic, Gulf and Pacific Company of West Virginia are reserved to the Government of the Philippine Islands.

No person belonging to, or employed in, the military service of the

United States, members of a provincial or municipal board, delegates to the Legislature of the Philippine Islands, nor officials appointed by the President of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom.

9 This contract shall be subject to approval of the Governor General of the Philippine Islands.

In witness whereof the parties aforesaid have hereunto placed their hands the date first herein before written.

Witnesses:

MILTON W. CAZANSKY, as to
C. McD. TOWNSEND,
Major Corps of Engineers, U. S. A.,
In Charge of Port Works.

G. W. VILAIN, as to
ATLANTIC, GULF & PACIFIC CO.,
By WICKHAM QUINAM.

(Executed in Quintuplicate.)

Approved August nine, 1905.
LUKE E. WRIGHT,
Governor General, Philippine Islands.

EXHIBIT "B."

Specifications.

Work to Be Done.

1. The work to be done under these specifications consists in the construction of such rock and timber bulkhead as may be necessary to retain filling for an extension to the Luneta of the City of Manila; dredging sufficient material from the harbor to fill the space behind the new bulkhead and deposit not to exceed 400,000 cubic yards of dredged material on the existing reclaimed area; constructing the rip-rap foundations of an extension to the present East Breakwater as provided for in Act 1360 of the Philippine commission; and constructing a concrete foundation for a lighthouse at the other end of the West Breakwater.

Location.

2. The location of the work is as shown on the accompanying plan.

Bulkhead.

3. The bulkhead will be constructed with a double row of piles, driven to a depth at least twenty (20) feet into the bottom, and faced with sheet piling extending at least ten (10) feet into the bottom and so driven and fastened as to be mud tight.

10 The elevation of the finished work will be eight and one-half (8½) feet above mean low water, but the area will be

filled to ten and one half (10½) feet to allow for settlement and the contractor may temporarily give to the timber structure a greater height, to facilitate the deposit of the dredged material, provided that he cut it down to the established grade when so ordered by the Officer in Charge.

Rip-Rap Revetment.

4. The timber bulkhead will be reinforced with a rip-rap revetment placed against the outside and deposited in such a manner and at such times as will protect the structure against failure from pressure of the mud filling.

The completed revetment will have an elevation of seven (7) feet above mean low water, with a width of five (5) feet at the top and an outside slope of three (3) horizontal to two (2) vertical.

During the process of filling, the space behind the bulkhead, the rip-rap must be deposited to the full width of the section and must at all times be slightly above the level of the inside fill, until the specified section is obtained.

Damage to Bulkhead and Revetment.

5. The contractor will be responsible for damages to the bulkhead and revetment arising from wave action or from pressure of the revetment against the timber structure; but if a break is caused by pressure resulting from the mud fill, the repairs to the structure will be paid for by the Government at the prices specified in the contract; provided that the specifications have been fully complied with.

East Breakwater Extension.

6. The East Breakwater will be extended for one thousand (1000) feet, measured on the top. It will consist of a rip-rap embankment measuring twenty (20) feet at the top with end and side slopes of five horizontal to four (4) vertical and will be deposited by derricks or a method approved by the Officer in Charge. It will be brought to a grade of ten (10) feet below mean low water
11 and leveled up with small stone as directed by the Officer in Charge.

Rip-Rap Stone.

7. The rip-rap stone will be "quarry run" but no barge load shall contain more than ten (10) per centum of spalls or stone weighing less than ten (10) pounds, and must be free from all dirt and rubbish.

Measurement of Rip-rap.

8. The weight of all rip-rap stone will be determined by the displacement of the barge in which it is received.

The contractor will be required to pump the barge dry before displacement readings are taken.

All barges before being used for transporting the stone will be reweighed at the contractor's expense when directed by the Officer

in Charge, whose decision as to weights and measurement shall be final.

Deposits Outside of Lines.

9. No payment will be made for rip-rap deposited outside of the established grade lines and slopes unless such deposits are directed by the Officer in Charge.

Dredging.

10. The dredging will be at such places as may be designated by the Officer in Charge within the areas shown on the accompanying plan and will be carried to a depth, below mean low water, of eighteen (18) feet in the inner basin and thirty (30) feet in the outer harbor.

An allowance of one (1) foot greater than the prescribed depth will be made for necessary inaccuracy in dredging, but no payment will be made for any material excavated beyond this extra depth.

The contractor will be required to leave clear cuts behind the dredge and, in case of lack of the prescribed depth due to shoaling or other causes in any part or parts of the area worked over, he will be required, at any time before the final payment is made, to redredge such places to the prescribed depth.

12 Measurement of Dredging.

11. The amount of material dredged will be measured in cut. Surveys of the area to be dredged will be made before the work commences and before final payment, from which the amount of dredged material will be computed.

Deposit of Dredged Material.

12. The dredged material will be deposited behind the bulkhead and on the existing area of reclaimed ground.

The dredged material will be deposited at the times and the places directed by the Officer in Charge or his representatives.

All levees and walls necessary to retain the dredged materials and to prevent the flooding of adjoining property will be built and maintained by and at the expense of the contractor as directed by the Officer in Charge.

All losses of dredged material from the fills, excepting those due to failure of the bulkheads from pressure of the mud fill as stated in Article 5, will be measured as carefully as conditions will permit and the computed amounts deducted from the statement for the final payment.

Light-house Foundations.

13. A block of concrete and rubble stone will be placed at the end of the West Breakwater for a foundation to the proposed light-house.

This block will be of the form and dimensions shown on the accompanying drawings. The bottom of the block will be three (3)

feet below and its top fourteen (14) feet above mean low water. If more rip-rap is required to complete the slopes of the substructure and to back up the completed block it must be composed of stones weighing not less than 2,000 pounds each and will be paid for at the same rate as the rip-rap in the East Breakwater extension and bulkhead revetment.

The concrete will be formed of broken stone, sand and Portland cement, in the proportions of six parts stone, three parts sand and one part cement by volume for the part above two feet above low water and four parts stone, two parts sand and one part
13 cement for the part below this grade.

Large rubble stone weighing not less than one thousand (1,000) pounds may be placed in the concrete in such a manner that no stone shall be nearer than one foot all around to another or to the exposed sides of the block and the concrete thoroughly tamped around them.

The exposed sides and top of the block will be faced to a thickness of four (4) inches with concrete of the proportions of four of stone, two of sand and one of cement deposited at the same time as the adjacent concrete so as to unite with it forming one mass.

A wooden mould will be constructed on the substructure in which the concrete block is to be made. This mould will consist of sides only thoroughly braced to prevent deformation, and lined with dressed lumber so as to present a smooth surface on the interior. The stone of the substructure will be covered with burlap sacking loosely placed so as to form the bottom. The construction of the block will proceed continuously without interruption until the whole mass is placed.

The mould will be left in place until in the judgment of the Officer in Charge the concrete is thoroughly hardened.

The Officer in Charge may prescribe such rules as he deems advisible for the inspection and manipulation of the materials used in the concrete and for putting the concrete in place.

Sand.

14. The sand used in making concrete must be clean, sharp and silicious, to be screened and washed if required, and otherwise subject to the approval of the Officer in Charge or his representative.

Broken Stone.

15. The broken stone must be hard and durable, with sharp edges, clean and free from dirt and must be of a size to pass a two (2) inch ring.

14

Cement.

16. The cement used in making the concrete must be of the best quality of true Portland cement of a brand satisfactory to the Officer in Charge.

It must be finely ground so that at least ninety per cent will pass through a No. 100 sieve. It must be packed in strong well made

barrels lined with paper so as to be secure from the effects of air and moisture.

When opened the cement in each barrel must be dry and free from any lumps or other injury from moisture. Each barrel of cement must weigh not less than 400 pound- gross and 375 pounds net.

The cement must not set in less than thirty minutes and will be required to satisfy the following tests:

Briquettes made of one part cement and three parts sand as follows:

One day in air and six days in water, 140 pounds per square inch.

One day in air and twenty-seven days in water, 225 pounds per square inch.

When mixed neat the cement must have a tensile strength of 450 pounds per square inch, exposed one day in air and six days in water.

The sand used in preparing the briquettes will be A. S. C. E. Standard.

Cement which in the judgment of the Officer in Charge or his representatives has become defective from any cause, before or after having been tested, may be rejected.

General Specifications.

Estimate of Quantities.

17. It is understood and agreed that the quantities given are approximate only, and it must be understood that no claim shall be made against the United States Government of the Philippine Islands on account of any excess or deficiency, absolute or relative, in the same. Bidders are expected to examine the drawings, and are invited to make the estimates of quantities for themselves. It is not expected that the actual quantities will vary more than ten per cent from the estimates.

Measurements.

18. Rip-rap stone will be measured and paid for by the ton of 2,240 pounds, concrete by the cubic yard in place, timber bulkhead by the lineal foot of completed work, and dredging by the cubic yard measured in cut.

The decision of the Officer in Charge of Port Works as to quality and quantity shall be final.

Payments.

19. Payments will be made monthly. A percentage of ten (10 per centum will be reserved from each payment until completion of the contract.

20. The contractor must begin the work, on or before August 1, 1905 and complete it by July 1st, 1907.

Extension of Time.

21. Should the time for the completion of the contract be extended, all expenses for inspection and superintendence during the period of extension, the same to be determined by the Officer in Charge of Port Works, shall be deducted from payments due or to become due to the contractor; Provided, however, that if the party of the first part shall in the exercise of his discretion, because of quarantine restrictions, freshets, or other force or violence of elements, allow the contractor additional time in writing as provided for in the form of contract, there shall be no deduction for the expenses for inspection and superintendence for such additional time so allowed: Provided further, that nothing in these specifications shall affect the power of the party of the first part to annul the contract as provided for in the form of contract.

Claims.

22. The contractor will be required to hold the Government of the Philippine Islands harmless against all claims for the use of any patent article, process or appliance in connection with the contract herein contemplated.

16

Inspection of Material.

23. The work will be conducted under the direction of the Officer in Charge, who shall have power to prescribe the order and manner of executing the same in all its parts; of inspecting and rejecting materials, work and workmanship which, in his judgment, do not conform to the drawings and that may be furnished from time to time, or to these specifications. And any material, work or workmanship so rejected by him shall be kept out of or removed from the finished work, and no estimate or payment shall be made until such material, work or workmanship be so removed.

When so required, rejected material shall be piled up in sight near the works and kept there until the Officer in Charge gives permission to have it removed.

Inspectors.

24. The Government will keep inspectors on the works, who will receive instructions from the Officer in Charge. They will have power to object to any materials, work or workmanship. Any material, work or workmanship objected to by the inspectors shall be kept out of or removed from the finished work, unless in each particular case the objections of the inspectors shall be overruled by the Officer in Charge, and unless the objection be so overruled, no estimate or payment shall be made until such material, work or workmanship be so removed.

The Officer in Charge shall have power to overrule or rescind any or all objections or decisions of the inspectors.

The decisions of the Officer in Charge of Port Works, in charge of the work shall be final and conclusive upon all matters relating

to the work, and upon all questions arising out of these specifications during the progress of the work, until final payment is made, and from his decisions there shall be no appeal.

Location of the Work.

25. The location of the work will be fixed by the Officer in Charge or his agents. The level of mean low water will be established before the commencement of the work and shall not be changed
17 during its progress. Lines will be plainly marked by stakes, range mark piles or other suitable method.

The contractor will be required to furnish without expense to the Government all stakes, piles, gauges, buoys, ranges or other material required for laying out and conducting the work, and furnish men and boats to place and maintain them as directed by the Officer in Charge. No work will be permitted unless the necessary gauges, ranges, buoys, etc., are in proper position and visible from the plant employed for that work. When required the contractor is to furnish without expense to the Government, boats and men to enable the inspectors to properly perform their duties.

Board and Lodgings for Inspectors.

26. The contractor may be required to furnish to inspectors meals and lodging on his dredgers or boats, at the quarries or at other points where, on account of the nature of the inspector's duties, or for other reasons, suitable accom-odations cannot readily otherwise be obtained. Such meals and lodgings furnished by him will be at least equal in every respect to those furnished to his local superintendent. The contractor will make no charge for such meals and lodgings.

Position of Vessels.

27. The vessels from which stone is deposited in the breakwater must be moored in position under the direction of the Officer in Charge or his representatives before depositing is commenced. The buoys or other appliances for mooring must be established and maintained by the contractor.

Lights and Buoys.

28. During the progress of the work, the contractor must keep suitable lights from sunset to sunrise upon all his vessels anchored at or in the vicinity of the work. He must maintain on the work at his own expense such lights and buoys as the Officer in Charge may direct.

The Government of the Philippine Islands will not be responsible for any accident which may occur to the contractor's plant,
18 or to passing vessels or to any property whatever during the progress of the work.

Working Hours.

29. Except when required by the Officer in Charge in the manufacture of concrete in large masses, no work will be done on the breakwater between the hours of sunset and sunrise, nor upon any part of the work on Sundays and legal holidays, without the special authority of the Officer in Charge.

Competent Employés.

30. The contractor will at all times employ competent and skilled men. If in the opinion of the Officer in Charge any employé shall be incompetent, disrespectful or disorderly, he will be immediately discharged at the request of the Officer in Charge and shall not again be employed under this contract.

Quarries.

31. The contractor will be allowed the use of quarries on available public lands in approved localities, without charge.

Contractor's Agent.

32. The contractor must either personally supervise the work during its progress or have it constantly supervised by a skilled and responsible representative so as to assure a compliance in every respect with the instructions of the Officer in Charge or his representative, as to the order, extent and quality of the prescribed work, its rate of progress and all other matters not otherwise provided for.

Failure to Prosecute or Protect Works.

33. If the contractor shall refuse or fail to commence or to prosecute the work or provide for carrying on the same as directed by the Officer in Charge or fail to properly protect any part of the work, pemanent or temporary, the Officer in Charge shall have power to employ men, to purchase or otherwise provide materials, tools, machinery, etc., and put the work in proper advancement or condition, and the entire cost of doing so shall be deducted from payments to be made under this contract.

19 Time of Work on Light-house Foundations.

34. The work of constructing the concrete light-house foundations will be done during the months of November, December, January, February, March and April.

Repair to Old Bulkhead.

35. Any rip-rap required for repairing the bulkhead, retaining the existing made ground, will be delivered and paid for at the same rate as that for the East bulkhead extension bulkhead revetment.

EXHIBIT "D."

Whereas, the contract between the Government of the Philippine Islands, represented by C. McD. Townsend, Major, Corps of Engineers, U. S. A., and the Atlantic, Gulf & Pacific Company of West Virginia, U. S. A., for the construction of the Luneta Extension, which contract was approved by the Honorable, the Governor-General of the Philippine Islands, on August 9, 1905, contains, among other things, the following provision:

"If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Governor-General of the Philippine Islands."

And whereas, Article Five of the specifications of said contract provides that:

"The contractor will be responsible for all damages to the bulkhead and revetment arising from wave action or from pressure of the revetment against the timber structure; but if a break is caused by pressure resulting from the mud fill, the repairs to the structure will be paid for by the Government at the prices specified in the contract, provided that the specifications have been fully complied with."

And whereas, on the first day of May, 1906, a break in the bulkhead and revetment occurred, caused by pressure resulting from the mud fill, so that the repairs thereby made necessary ought to be paid for by the Government in accordance with paragraph five of said specifications, and

Whereas, it has been determined that the rep-irs to the structure ought to be made, not by the construction of a new bulkhead of timber and replacing of the revetment of stone, as contemplated in said contract, but it has been found advantageous and necessary to modify the project so that the repairs should be made by filling the space that has given way with rock and by filling the interstices of such rock with clay, soil, gravel or broken stone, so that the water pumped into the fill would not flow through it and thus escape, and by the erection on the top of the rock so constructed of a temporary timber bulkhead, and that such change in the character of the repairs to be made would either increase or diminish the cost of the work, and

Whereas, It has been ascertained that to fill the space made by the giving way of the previously existing bulkhead would require approximately 3,000 tons, more or less, of stone, 1,500 tons, more or

less, of clay, soil, and gravel, or broken stone, and 200 lineal feet, more or less, of temporary timber bulkhead;

Now therefore, in pursuance of the provisions of said contract found on the third page thereof, the following agreement is entered into on this twenty-fourth day of May, 1906, between W. L. Fisk, Lieutenant Colonel, Corps of Engineers, U. S. Army, Di-
21 rector of Port Works, of the first part, and the Atlantic, Gulf and Pacific Company of West Virginia, U. S. A., of the second part, to-wit:

That the repairs aforesaid required to be made by the Government of the Philippine Islands, in accordance with paragraph five of said specifications shall be made in the manner above stated instead of in the manner provided in said paragraph five of said specifications, and shall be made by the Atlantic, Gulf & Pacific Company, and that the expense of such repairs shall be paid for by the Government of the Philippine Islands at the actual and reasonable cost thereof, plus fifteen per centum. The word "cost" as herein used is understood to mean only the actual labor, foreman hire, materials and supplies required to do the work, except rock and dredging which are provided for in detail in said contract, and the fifteen per centum is expected to cover all other items, such as general superintendence, office expenses, rental of plant, and profit;

Provided, however, That all rock*s* deposited is to be paid for upon the basis mentioned in the original specifications, and not upon the basis herein stated.

This Agreement shall be subject to the approval of the Governor-General of the Philippine Islands.

In witness whereof the parties aforesaid have hereunto set their hands this twenty-fourth day of May, 1906.

Witnesses:

H. L. FISCHER as to

W. L. FISK,
Lieut. Col. Corps Engineers, Director of Port Work.

G. V. VILAIN as to

ATLANTIC, GULF & PACIFIC CO.,
By WICKHAM QUINAN.

Executed in quadruplicate.

Approved —— —, 1906.

HENRY C. IDE,
Governor-General, Philippine Islands.

22 EXHIBIT "E."

Department of Commerce and Police,
Bureau of Port Works,
Santa Lucia Building, Malecon Drive, Manila, P. I.

MAY 26, 1906.

The Atlantic, Gulf & Pacific Co., Manila, P. I.

GENTLEMEN: The following telegram was sent to Commissioner Forbes on May 25, 1906:

MANILA, P. I., *May* 25, 1906.

"Forbes, Baguio:

For most of typhoon damage I hold contractors responsible; they claim Government responsible for all on account delay repairing first break, but wish to make repairs in manner authorized for first break leaving settlement of liability to be determined later. Repairs should be made at once, but in view of contract requirement that no payments shall be made unless agreement is approved before obligation is incurred do not see how contractors can be authorized proceed before determination of liability. What action is desired?

FISK."

To the above wire the following reply has this day been received:

BAGUIO, *May* 25, '06.

"Fisk, Port Works, Manila:

Governor General and I approve authorizing contractors to proceed immediately to make repairs on lines indicated, with the understanding that all rights reserved in regard to adjudication of liabilities.

FORBES."

23 In accordance with the above, you are authorized to proceed to make repairs to the break in the Luneta Extension bulkhead in the manner outlined in supplemental agreement entered into between yourselves and the Insular Government on May 24, 1906.

Kindly acknowledge your acceptance of these conditions.

Very respectfully, W. L. FISK,
Lieut. Colonel, Corps of Engineers,
U. S. Army, Director of Port Works.

On the — day of —— 1907, the Government interposed a demurrer to the complaint based upon the ground that the complaint does not state facts sufficient to constitute a cause of action.

On the 19th day of July 1907 the Judge of the Court of 1st Instance made the following order sustaining the demurrer.

Order.

This case is now before the Court for hearing the demurrer presented by the defendant to plaintiff's complaint.

Wm. J. Rohde Esq., appeared for the plaintiff and Geo. N. Hurd, Assistant Attorney General, appeared for the defendant.

The demurrer was made upon the ground that the complaint does not state sufficient facts to constitute a cause of action. The complaint is for the recovery of damages to have been suffered by the plaintiff arising from the expense incurred in repairing about 200 feet of bulkhead and rock revetment upon the sea wall constructed by the plaintiff under the contract with the defendant, which contract is attached to the complaint and made a part thereof.

It is alleged that the said bulkhead and rock revetment were displaced by pressure from the inside fill and moved into the
24 waters of the Bay of Manila, and before the break could be repaired a severe typhoon occurred and the said bulkhead and rock revetment being without the support of the inside fill, which had escaped through the displacement described, were completely destroyed and the plaintiff suffered loss on account thereof.

Under the conditions of the contract made between the plaintiff and the defendant for the construction of sea walls a portion of which was destroyed by the typhoon, as appears from the fifth paragraph of the specification accompanying, the contractor (the plaintiff) is held responsible for all damage to the bulkhead and revetment, arising from wave action or pressure of the revetment, caused the damage structure, and the Government (the defendant) is held responsible for any break caused by the pressure, resulting from the mud fill.

The complaint alleges that the break occurred by the pressure from the mud fill and that the break thus made was made the subject matter of an additional agreement between the plaintiff and the defendant, which agreement is made a part of the complaint, but this does not in any way change the liability in relation to damages caused as herein before stated. Both under the Civil Code and at Common Law, in the absence of any agreement to the contrary, under the contract in this case, the plaintiff would be required to suffer loss in case of the destruction of the contracted work before it is completed, even though the loss is unavoidable.

In this case the parties specifically expressed the responsibility of each party for damages which might arise of the nature of those which are the subject matter of this action. The damages arising and for which the defendant was responsible as above is made the subject of an additional contract whereby the defendant is
25 responsible. I am of opinion that the plaintiff having assumed the responsibility for all damages to the bulkhead and revetment of the sea wall contracted for by it, arising from wave action or from pressure of the revetment caused the damaged structure, cannot recover from the defendant for such damages, even though the damage would not have occurred if the mud fill had not run out, owing to the break in the wall by pressure of the

mud fill, for which the defendant was responsible and which it has satisfied.

I am of opinion that the plaintiff's complaint does not state sufficient facts to constitute a cause of action against the defendant.

It is therefore ordered that the demurrer be and the same is sustained.

Manila, P. I., July 19th, 1907.

(Sgd.) A. S. CROSSFIELD, *Judge.*

Title.

This 23 day of July 1907 notices of the foregoing order were sent to the parties.

The plaintiff duly excepted to this order of the Court.

On the 27th day of July 1907 the plaintiff without amending its complaint asked the judgment of the Court.

On the same day the Court dismessed the action and the plaintiff duly excepted.

On the 31 day of July 1907 the plaintiff gave notice of its intention to perfect a bill of exceptions.

Assignment of Errors.

1. The Court erred in sustaining the demurrer to the complaint.
2. The Court erred in dismissing the action.

26 I hereby certify that the foregoing Bill of Exceptions is correct and contains all the essential parts for a clear understanding of all the errors assigned. Execution of the judgment shall not be stayed unless the appellant executes a good and sufficient bond in the sum of — Pesos, with sureties of recognized solvency to the satisfaction of the Court, to secure the performance of the judgment appealed from in case it be affirmed in whole or in part.

Manila, 1st of August, 1907.

(Signed) A. S. CROSSFIELD, *Judge.*

PHILIPPINE ISLANDS,
Manila, ss:

The undersigned certifies that the foregoing Bill of Exceptions, composed of 40 pages, is the original Bill of Exceptions presented by the appellant and approved by this Court.

In faith whereof I sign these presents, in Manila, this 8 day of August, 1907.

(Signed) J. McMICKING, *Clerk.*

On the eighth of August, 1907, the case was duly transmitted by the Clerk of the Court of First Instance of Manila to the Clerk of the Supreme Court of the Philippine Islands, wherein it was received on the same day.

On September seventh, 1907, appellant filed his brief in the Supreme Court and made the following assignments of error:

1. The Court erred in sustaining the demurrer to the complaint.
2. The Court erred in dismissing the complaint.

On October second, 1807, the appellee filed his brief and on the twenty-ninth of the same month the case was duly argued and submitted in the Supreme Court.

On February 18th, 1908, the Supreme Court of the Philippine Islands rendered the following decision, to-wit:

27 UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

No. 4195.

THE ATLANTIC, GULF & PACIFIC COMPANY
vs.
THE GOVERNMENT OF THE PHILIPPINE ISLANDS.

Decision.

TRACEY, *J.*:

This is an appeal by the plaintiff from a final judgment in favor of the defendant upon its demurrer to plaintiff's complaint which prayed for a recovery of P79,564.58 as damages for injuries to the Luneta improvement in the City of Manila by the typhoon of May 18th, 1906.

On July 24th, 1905, the plaintiff entered into a contract with a representative of the defendant to do the work on the Luneta extension, consisting of the construction of a rock and timber bulkhead, the dredging and filling of the space behind it with not to exceed four hundred thousand cubic yards of dredging material, the constructing of a riprap foundation for the extension of the break water and of a concrete foundation for a lighthouse.

The specifications of the contract provided:

"4. The timber bulkhead will be reinforced with a riprap revetment against the outside and deposited in such a manner and at such times as will protect the structure against failure from pressure of the mud filling.

"5. *The contractor will be responsible for all damages to the bulkhead and the revetment arising from wave action or from pressure of the revetment against the timber structure; but if a break is occasioned by pressure resulting from the mud filling repairs to*
28 *the structure will be paid for by the government at prices specified in the contract providing that the specifications have been fully complied with.*

"12. * * * "All losses of dredged materials from the fills, except those due to failure of the bulkhead from pressure of the mud fill, as stated in Article 5, will be measured as carefully as conditions will permit and computed amounts deducted from the final payment."

The complaint alleged: "That on the said 1st day of May, 1906, and while the said improvements were in a condition as provided for

in said contract, plan and specifications, a section of about 200 feet in length of the said bulkhead and rock revetment was displaced by the pressure from the inside fill and moved a distance of about 200 feet into the waters of the Bay of Manila, and that through the opening thus caused there escaped into the Bay a large quantity of the fill that had been pumped behind the said bulkhead; that after the break in the bulkhead and rock revetment of May 1st, 1906, the plaintiff proceeded as rapidly in the repairing of the said bulkhead and revetment as it was permitted to do by the Officer in Charge representing the defendant, and in strict and immediate compliance with the orders received from the Officer in Charge in that behalf; that thereafter and on the 18th day of May, 1906, before the aforesaid break in the bulkhead and revetment had been or could have been repaired, a severe typhoon occurred in the Bay of Manila; that the said bulkhead and rock revetment, being without support of the inside fill, which had escaped through the said break, were greatly damaged and completely destroyed for a distance of about 1,800 feet by the pressure of the rock revetment and the wind and wave from the outside acting against the bulkhead and revetment, which because of the escape of the heretofore noted fill, was without support from the inside; that during and after the destruction of the
29 bulkhead and revetment, caused as aforesaid, a large additional quantity of the inside fill escaped into the Bay of Manila."

Plaintiff further alleges the fact to be that if the break in the bulkhead and rock revetment of May 1, 1903, caused as aforesaid by the pressure of the inside fill, had not occurred, that then no damage whatever would have been done to said improvements, bulkhead, rock revetment or fill by the typhoon of May 18th-19th, 1906, since the said bulkhead and rock revetment, when in the condition as provided for in said contract, plan and specifications, with the fill on the inside always about even with the rock revetment on outside and both the fill and the rock revetment being about four feet above mean low water mark, would have been sufficiently strong to resist the force of the wind and waves."

Upon this demurrer these allegations must be accepted as established facts, except in so far as they are statements of the contents or effect of the original contract and specifications annexed to the complaint. These documents, themselves, of course, control the mere recital of their tenor.

A supplementary contract was made between the same parties bearing date May 24th, 1906, containing a recital of the provisions of the first contract, together with the following clauses:

"Whereas, On the first day of May, 1906, a break in the bulk head and revetment occurred, caused by pressure resulting from the mud fill, so that the repairs thereby made necessary ought to be paid for by the government, in accordance with paragraph five of said specifications, and

"Whereas, it has been determined that the repairs to the structure ought to be made, not by the construction of a new bulkhead of timber and replacing of the revetment of stone, as contem-
30 plated in said contract; but it has been found advantageous and necessary to modify the project so that the repairs should

be made by filling the space that has given way with rock and by filling the interstices of such rock with clay, soil, gravel or broken stone, so that the water pumped into the fill would not flow through it and thus escape, and by the erection on the top of the rock so constructed of a temporary timber bulkhead, and that such change in the character of the repairs to be made would either increase or diminish the cost of the work, and

"Whereas, It has been ascertained that to fill the space made by the giving way of the previously existing bulkhead would require approximately 3,000 tons, more or less, of stone, 1,500 tons, more or less, of clay, soil and gravel, or broken stone, and 200 lineal feet, more or less, of temporary timber bulkhead.

It then provided: "That the repairs required to be made by the Government of the Philippine Islands, in accordance with paragraph five of said specifications shall be made in the manner above stated instead of in the manner provided in said paragraph five of said specifications, and shall be made by the Atlantic, Gulf & Pacific Company, and that the expense of such repairs shall be paid for by the Government of the Philippine Islands at the actual and reasonable cost thereof, plus fifteen per centum."

On May 26, 1906, the government engineer addressed the following communication to the plaintiff:

"MAY 26, 1906.

"The Atlantic, Gulf & Pacific Company, Manila, P. I.:

"GENTLEMEN: The following telegram was sent to Commissioner Forbes on May 25, 1906:

Forbes, Baguio:

31 For most of typhoon damage I hold contractors responsible; they claim Government responsible for all on account delay repairing first break, but wish to *made* repairs in manner authorized for first break leaving settlement of liability to be determined later. Repairs should be made at once, but in view of contract requirement that no payments shall be made unless agreement is approved before obligation is incurred do not see how contractors can be authorized proceed before determination of liability. What action is desired?

FISK."

"To the above wire the following reply has this day been received:

BAGUIO, *May* 25, '06.

"Fisk, Port Works, Manila:

Governor General and I approve authorizing contractors to proceed immediately to make repairs on lines indicated, with the understanding that all rights reserved in regard to adjudication of liabilities.

"FORBES."

"In accordance with the above, you are authorized to proceed to make repairs to the break in the Luneta Extension bulkhead in the

manner outlined in supplemental agreement entered into between yourselves and the Insular Government on May 24, 1906."

It being conceded that the Government was to pay for the damage to the breakwater on May 1st, the question presented to us is who is to stand the consequences of the typhoon of May 18th-19th. As a general principle, in the absence of express agreement, the contractor must bear the loss from destruction of work under way, even in case of unavoidable accident, the rule in this jurisdiction being expressed in Article 1589 of the Civil Code as follows:

"If the contractor is obliged to furnish the material, he must suffer the loss in case of destruction of the work before delivery, unless delayed by the party who was to accept."

In this instance, however, the parties have not left their liabilities to the general principles of law, but have made their own rule, dividing the responsibility so that while the contractor should remain answerable for all damage from outside pressure on the struc-
32 ture from wave and rock revetment, the Government assumed charge of repairing the breaks caused by pressure from the inside fill. Were we called upon to interpret only this last undertaking of the Government, separated from its context, then the inquiry would simply be what must be considered the true cause of the giving way of the bulkhead, what is termed in American cases the proximate cause, not implying, however, as might be inferred from the word itself, the nearest in point of time or relation, but rather the efficient cause, which may be the most remote of an operative chain. It must be that which sets the others in motion and is to be distinguished from a mere preexisting condition upon which the effective cause operates, and must have been adequate to produce the resultant damage *without the intervention of an independent cause.*

Insurance Co. vs. Boon, 95 U. S. 117, pages 130 and 133;
Scheffer vs. Railroad Co. 105 U. S., 249;
St. Louis I. M. & S. R. Co. vs. Commercial Ins. Co. 139 U. S. 223, page 237;
Washington & G. Railway Co. vs. Hickey, 166 U. S. 521;
The G. R. Booth, 171 U. S. 450.

It is to be noted in these cases and throughout this opinion that the terms "cause" and "condition" are used in their English acceptation rather than that of the Spanish Civil Law.

Obviously in the present case such a proximate cause of the accident was either the typhoon of May 18th or the pressure of the mud fill producing the earlier break of May 1st. Considering the undertaking of the Government only and disregarding that of the contractor, the typhoon could not be considered an independent cause, for the reason that it was within the scope of the contract itself, one of the general objects of which in the clause under consideration was to provide against the consequences of such events. Nor for a like reason would the absence of the sustaining mud fill be regarded as a mere disconnected condition, but rather as a connecting cause.

as it was the direct result of over pressure from within,
33 through the fault of one of the parties, for which the contract expressly furnished a remedy. As a consequence we should be led to the conclusion that the proximate cause of the damage was not the typhoon, one of the contingencies provided against in the contract, but rather the over pressure of the fill, producing the escape of material and the weakness of the bulkhead, which rendered the destruction by the typhoon possible. But when we come to consider the effect of the counter undertaking of the company, we find the terms of the obligation and the relation of the parties changed. Between this primary cause and its ultimate effect, they have chosen to interpose an independent cause. Storms, typhoons and external wave pressure are not left as foreseen contingencies to which other agencies might be attributed as causes, but are constituted in themselves independent causes of any damage that may result, for the consequences of which the contractor expressly agrees to be responsible. For such is the necessary effect of the words. "The contractor will be responsible for all damages to the bulkhead and the revetment arising from wave action or from pressure of the revetment against the timber structure." They recognize exterior pressure as an independent agent of any injury that might occur therefrom. In other terms, the injuries to the breakwater, resulting from the typhoon, might be said to have as their proximate cause the anterior over pressure from within, producing the damaged condition following the break of May first, had not the contractor stipulated to be responsible for all damages arising from pressure from without, by such stipulation constituting such external pressure a separate and an independent as it was clearly an intervening cause, for which he assumed the responsibility. It is plain that had there been no pressure from the typhoon, no injury would have resulted from lack of the sustaining mud fill which
had escaped. The break was immediately occasioned by
34 wave action and the outside pressure of the typhoon. The contractor expressly agreed to answer for all damages from this source and the effect of this branch of the stipulation is while changing into a preexisting condition what, without it, would have been a connecting cause, to convert into an independent cause for which the contractor is liable, that which otherwise would have been a casualty within the purview of the contract.

In support of this view of the subject, it must be borne in mind that the liability of the Government is narrowed by two important limitations, first, it does not extend to all kinds of damage, but only to repairs of any break in the bulkhead; and second, to such a break only when resulting from pressure from within and not from lack of such pressure. This furnishes a strong suggestion that what the parties had in mind was not the remote consequence of a damaged structure, but rather the immediate repair of any break that might occur, thus looking separately to each particular break and its immediate cause.

The rules for the interpretation of contracts are found in Chapter IV. of Title II of Book IV of the Spanish Civil Code where in

Article 1282 the elemental principle that contracts are to be interpreted in accordance with the intention, as shown by the acts of the parties, is expressly enjoined upon us as a primary canon of construction, in these words:

"In order to judge of the intention of the contracting parties, regard must be had *principally* to their acts, both contemporaneous and subsequent to the contract."

We need not resort to conjecture as to what their acts in this case might have been, for we find them expressed in the supplemental contract of May 24th. At that time the first break was more than three weeks old and five days had passed since the damage from the typhoon was apparent; nevertheless, in this agreement, reciting the occurrence of May first, and purporting to completely provide
35 for its consequences, it is stated that to fill the space made by the giving way of the bulkhead would require approximately three thousand tons of stone, fifteen hundred of clay, or similar material, and two hundred lineal feet of timber, these quantities answering evidently to the immediate need of the break of May first, whereas the repairs necessitated by the typhoon, as stated in the complaint, called for fifteen thousand tons of rock, one hundred and sixteen thousand cubic tons of fill and other items. Had it been on the 24th of May in the minds of these parties that the repairs to the second break were to be considered part of the resultant damage of the first break, is it possible that they should have omitted from their computation the greater amounts, overlooking them while specifying the lesser results of the earlier accident. Had they then interpreted their contract as imposing on the Government the liability for the injuries of May 18th-19th, it is to be presumed that they would have so stated, or at least that the question would have been reserved for future settlement. It was only after the execution of this agreement that a claim was made that the Government was responsible for the effect of the typhoon. It is apparent from the communication of the engineer that as soon as stated this claim was resisted, and that in order to expedite the work and avoid future damage the reservation was made of liabilities for future adjudication.

Moreover the contract of May 24th, having gone into force prior to this reservation and independent of it, should in fairness be given its apparent effect of an adjustment of the damages suffered by the break of May first, and operates as a settlement of all claims existing when it was signed, five or six days after the typhoon. This view renders it unnecessary for us to determine whether the item of P27,840.00, the cost of replacing the fill behind the bulkhead, which enters into the damage sought by the plaintiff, as well as a proportional part of the item of P10,000.00 for labor, can be con-
36 sidered as a part of the "Repairs to the Structure" which alone the government in any case agreed to pay for.

Our conclusion, therefore, is that interpreting this somewhat ambiguous contract in the light of the acts of the parties themselves, and giving effect to their agreement in settlement of the losses by the break of May first, the plaintiffs have made themselves responsible for the damage by the typhoon and cannot recover in this action.

The judgment of the Court of First Instance must, therefore, be affirmed.

(Signed) JAMES F. TRACEY.

We concur:
C. S. ARELLANO, *C. J.*
FLORENTINO TORRES.
VICTORINO MAPA.
CHARLES A. WILLARD.

We dissent:
E. FINLEY JOHNSON.
A. C. CARSON.

37 UNITED STATES OF AMERICA,
Philippine Islands:

In the Supreme Court of the Philippine Islands.

R. G. No. 4195.

THE ATLANTIC, GULF & PACIFIC COMPANY
versus
THE GOVERNMENT OF THE PHILIPPINE ISLANDS.

Petition for Rehearing.

In view of the difficulty of translating the discussion of the point involved accurately, we beg leave to submit this petition for a rehearing in English only. It is nearly impossible for us to clothe the same ideas in Spanish in the form of a translation. It would necessarily result in an independent discussion.

For the purpose of bringing clearly before the Honorable Court the points where we consider the decision erroneous, we will present to the Court the text of its own decision with such amendments as seem to us more in harmony with the question involved in this case.

The first six pages of the decision of the Honorable Supreme Court need no observation. On the seventh page we make one alteration, which does not at all change the sense of the contents of said page.

On page- 7 and 8 there are a number of changes which partly
38 set forth our views in themselves and which we will further explain further on.

We submit to the Court as our argument the following amended part of the decision:

"In this instance, however, the parties have not left their liabilities to the general principles of law, but have made their own rules, dividing the responsibility so that while the contractor should remain answerable for all damage from outside pressure on the structure from wave and rock revetment, the Government assumed charge of repairing the breaks caused by pressure from the inside fill. We will first interpret only this last undertaking of the Government,

separated from its context; then the inquiry simply is, what must be considered the true cause of the giving way of the bulkhead,—what is termed in American cases the proximate cause, not implying, however, as might be inferred from the word itself, the nearest in point of time or relation, but rather the efficient cause, which may be the most remote of an operative chain. It must be that which sets the others in motion and is to be distinguished from the mere pre-existing condition upon which the effective cause operates and must have been adequate to produce the resultant damage without the intervention of an independent cause.

Insurance Co. vs. Boon, 95 U. S., 117; et-. etc.

"It is to be noted in these cases, and throughout this opinion, that the terms "cause" and "condition" are used in their English acceptation rather than that of the Spanish Civil Law.

"Obviously in the present case such a proximate cause of
39 the accident was either the typhoon of May 18th or the pressure of the mud fil/ producing the earlier break of May 1st. Considering the undertaking of the Government and that of the Contractor together, the typhoon could not be considered an independent cause, for the reason that it was within the scope of the contract itself, one of the general objects of which in the clause under consideration was to provide against the consequences of such events when operating as a primary or proximate cause.

"Art. 1107. "Los daños y perjuicios de que responde el deudor de buena fé son los previstos ó que se hayan podido preveer al tiempo de constituirse la obligación y que sean consecuencia necesaria de su falta de cumplimiento."

Código Civil.

"Nor for a like reason would the absence of the sustaining mud fill be regarded as a mere disconnected condition, but rather as a connecting cause, as it was the direct result of over-pressure from within through the fault of one of the parties, for which the contract expressly furnished a remedy.

"As a consequence we are led to the conclusion that the proximate cause of the damage was not the typhoon,—one of the contingencies provided against in the contract, but rather the over-pressure of the mud fill producing the escape of the material and the weakness of the bulkhead which rendered the destruction by the typhoon possible. But when we come to consider the effect of the undertaking of the Company we find the terms of the obligation and the relation of the parties changed, unless the obligations are referred and made applicable to the proximate or primary cause. If we look to
40 the proximate cause of the damage, there is no change, for, as has been stated, the proximate cause was the break of May 1st. It is true that between this primary cause and its ultimate effect there intervened a new force. This, however, was not an independent cause, for reasons just stated. Storms, typhoons and external wave pressure are not left as foreseen contingencies to which other agencies might be added as causes, but are considered in them-

selves independent causes of any damage that may result, for the consequencies of which the Contractor expressly agrees to be responsible. This obligation, however, must be interpreted as applying only when they are the real primary or proximate cause, and not when merely an intermediate agency. Such is the necessary effect of the words the contractor will be responsible for all damages to the bulkhead and the revetment arising from wave action, or from pressure of the revetment against the timber structure. On May 1st two hundred feet of the timber structure were carried away, against which no wave action could be exerted on May 18th, or pressure from the revetment either. They recognize exterior pressure as an independent agent of any injury that might occur therefrom. In other words, the injuries to the breakwater resulting from the typhoon may be said to have as their proximate cause the anterior overpressure from within producing the damaged condition following the break of May 1st, and although the contractor stipulated to be responsible for all damages arising from pressure from without, such stipulation considered such external pressure a separate and independent cause, and not an intervening cause which, without the proximate cause, would have produced no damage at all. It
41 is plain that had there been no pressure from the typhoon, no injury would have resulted from lack of the sustaining mud fill, which had escaped. The break was immediately occasioned by wave action and the outside pressure of the typhoon, but the proximate cause of the damage, nevertheless, was the break of May 1st. The contractor expressly agreed to answer for all damages from rock revetment and wave action, but the effect of this branch of the stipulation cannot change into a pre-existing condition what without it would have been a connecting cause, nor convert into an independent cause, for which the contractor is liable, that which otherwise would have been a casualty within the purview of the contract, since the laws of cause and effect are natural laws which remain entirely unaffected by contracts among men. Contracts may fix liabilities for certain contingencies, but the contingency itself will arise in its natural course, no matter what the contract may be."

In explanation of our argument submitted to the Court in the form of the decision of the Honorable Supreme Court, somewhat changed, we respectfully repeat that it is our contention that the contract stipulations of the parties to this suit refer and should be made applicable to the proximate cause of any damage.

On page 7 of the decision of the Supreme Court there is a sentence which begins: "were we called upon to interpret only this last undertaking of the Government." In this sentence the Supreme Court in fact discusses only the undertaking of the Government. On page 2 of this petition for a rehearing we have therefore changed
42 the beginning of this sentence into "we will first interpret only this last undertaking of the Government."

On page 8 of the decision of the Court, the second sentence of the second paragraph begins: "Considering the undertaking of the Government only, and disregarding that of the contractor, etc." In this sentence the Supreme Court, although ostensibly considering

only the undertaking of the Government, does in fact consider both the clauses of the contract to such an extent that it states in the same sentence that the obligation of the Atlantic, Gulf — "was within the scope of the contract itself," and further on in the same sentence states that this latter clause is the "clause under consideration." This sentence we have therefore changed in the petition for rehearing into "Considering the undertaking of the Government and that of the contractor together, etc."

Likewise on page 8 the Court states "But when we come to consider the counter-undertaking of the Company, we find the terms of the obligation and the relation of the parties changed." This sentence we have changed into "But when we come to consider the effect of the undertaking of the Company, we find the terms of the obligation and the relation of the parties changed, unless the obligations are referred and made applicable to the proximate or primary cause.

The substance of the decision of the Supreme Court discusses the proposition involved in this case in the following sequence:

First. The obligation of the Government;

Second. The obligations of the Government and the Company together;

Third. The obligation of the Company.

43 On page 8 of the decision the discussion of the obligation of the Government ends and the decision proceeds to discuss the obligation or undertaking of the Company beginning with the sentence: "But when we come to consider, etc."

On page 7 of the decision the Court cites Article 1589 of the Civil Code.

It is clear that under the article cited, if there had been no stipulations in the contract relating to responsibility for damages, that the Company would have had to bear all the damages of May 1st and 18th. That is to say, the responsibility for damages to the structure during the course of construction falls on the contractor altogether, unless taken away by contract.

We therefore respectfully ask the Honorable Court to consider at the part of the sentence indicated, page 8, the following proposition:

What is the effect of the stipulation binding the contractor, when without that stipulation he had absolutely the same responsibility? If the clause fixing the responsibility of the Company had not been put into the contract, the Company would still have had absolutely the same responsibility.

The only clause that changes any responsibility under the law is the clause fixing the responsibility of the Government.

If the Honorable Supreme Court will continue its discussion of the question involved on page 8 at the point indicated, then we believe that it will come to a different conclusion.

The decision of the Supreme Court also deduces a wrong conclusion of fact from the signing of the contract of May 24th. The Court will see from the record that the parties were in the town of Baguio, Benguet, at the time the contract was signed.

44 We submit herewith a statement of the Honorable Cameron Forbes, whose signature appears signed to the telegram set out in the decision of the Court, from which it appears that the deduction of fact made by the Supreme Court is clearly erroneous.

We believe that it is generally considered that settlement *is* should be set up as a special defense. Likewise facts from which a settlement might be deduced should be claimed and pleaded as a special defense.

For the reasons herein stated, we respectfully ask that a rehearing be granted so that the real question involved in this case may be discussed by the parties.

Respectfully,

(Signed) HARTIGAN & ROHDE,
Attorneys for Plaintiff.

On the twenty-fifth of February, 1908, the foregoing petition for a rehearing was denied by the Supreme Court of the Philippine Islands.

ATLANTIC, GULF & PACIFIC COMPANY
versus
THE GOVERNMENT OF THE PHILIPPINE ISLANDS.

Comes now the Atlantic, Gulf & Pacific Company and excepts to the decision of the Supreme Court rendered in this case and to the overruling of the petition for rehearing.

Manila, March 2, 1908.

(Signed) HARTIGAN & ROHDE,
Attorneys for Plaintiff.

On the 6th day of March, 1908, the Supreme Court ordered that the foregoing exception be attached to the record of the case.

45 On the eleventh day of March, 1908, a final judgment was entered in the above entitled cause, which said final judgment is in the words and figures following, towit:

THE UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

Docket No. 4195.

THE ATLANTIC, GULF AND PACIFIC COMPANY, Plaintiff and Appellant,
vs.
THE GOVERNMENT OF THE PHILIPPINE ISLANDS, Defendant and Appellee.

Final Judgment.

March 11, 1908.

Judgment Book 5, f. —.

This Court having regularly acquired jurisdiction of the above entitled cause, which has been submitted by both parties for de-

cision, and after consideration by the Court of the same upon the record and proceedings, and decision and order for judgment having been filed therein on the eighteenth of February, 1908,

It is hereby ordered that the judgment of the Court of First Instance of the City of Manila appealed from and dated July 27th, 1907, be, and it is hereby affirmed.

It is further ordered that * * * recover from * * * the sum of P. * * * as costs.

[Seal of Supreme Court.]

(Signed) J. E. BLANCO,
Clerk Supreme Court of the Philippine Islands.

46 UNITED STATES OF AMERICA,
Philippine Islands:

In the Supreme Court of the Philippine Islands.

R. G. No. 4195.

THE ATLANTIC, GULF & PACIFIC COMPANY, Plaintiff & Appellant,
versus
THE GOVERNMENT OF THE PHILIPPINE ISLANDS, Defendant & Respondent.

To Hartigan, Rohde & Gutierrez:

Please take notice that the annexed motion to strike from the records the purported statement of W. Cameron Forbes, United States Philippine Commissioner, filed in said case by the appellant on February 24, 1908, will be brought on for hearing before the Court at its regular session in the Supreme Court chambers in the City of Manila on the thirtieth day of March, 1908, at nine o'clock, a. m. of said day, or as soon thereafter as councel can be heard.

Dated this 19 day of March, 1908.

(Fdo.) GREGORIO ARANETA,
Attorney-General.

RDB—c.

Received copy this 19 day of March, 1908.

(Sgd.) HARTIGAN & ROHDE,
Attorneys for Appellant.

47 UNITED STATES OF AMERICA,
Philippine Islands:

In the Supreme Court of the Philippine Islands.

R. G. No. 4195.

THE ATLANTIC, GULF & PACIFIC COMPANY, Plaintiff & Appellant,
versus
THE GOVERNMENT OF THE PHILIPPINE ISLANDS, Defendant & Respondent.

And now comes the above-named respondent, by Gregorio Araneta, Attorney-General, and moves the Court to strike from the records of the above entitled case a certain statement purported to have been signed by W. Cameron Forbes, United States Philippine Commissioner, and filed by the appellant in the office of the Clerk of the Supreme Court and attached to the records in said case on the 24th day of February, 1908, in connection with a motion for a re-hearing, and subsequent to the decision of the said case by the Supreme Court, for the following reasons:

1. That this action is an appeal from an order of the lower court sustaining a demurrer to the plaintiff's complaint and dismissing the same.

2. That upon such demurrer the facts as alleged in the plaintiff's complaint are admitted, and the sole issue is upon the question as to whether the said complaint states facts sufficient to constitute a cause of action.

3. That the said statement so attached subsequent to the decision of this appeal in the Supreme Court is in the nature of evidence, or an addition to the complaint, and is, hence, not admissible, and the court can not properly consider the same.

48 For these reasons it is respectfully submitted that the purported statement should be stri-ken from the files of said case.

Dated this 19 day of March, 1908.

(Fdo.) GREGORIO ARANETA,
Attorney-General.

RDB—c.

UNITED STATES OF AMERICA,
Philippine Islands:

In the Supreme Court of the Philippine Islands.

R. G. No. 4195.

THE ATLANTIC, GULF & PACIFIC COMPANY, Plaintiff,
versus
THE GOVERNMENT OF THE PHILIPPINE ISLANDS, Defendant.

William J. Rohde, being first duly sworn on oath, deposes and says, that the amount claimed by the plaintiff in the above entitled

action is claimed in good faith, and that the value in controversy in the said cause exceeds Twenty-five Thousand dollars.

(Fdo.) WM. J. ROHDE.

Cedula F1292307; 2 January, 1908.

Subscribed and sworn to before me this 23rd day of March, 1908.

(Fdo.) ROMAN J. LACSON,
Notary Public.

My commission expires December 31st, 1908.

49 [Stamped:] Supreme Court of the Philippines, Clerk's Office. Filed Mar. 24, 1908, — M.

UNITED STATES OF AMERICA,
Philippine Islands:

In the Supreme Court of the Philippine Islands.

R. G. No. 4195.

THE ATLANTIC, GULF & PACIFIC COMPANY, Plaintiff,
versus
THE GOVERNMENT OF THE PHILIPPINE ISLANDS, Defendant.

The above named plaintiff, conceiving itself aggrieved by the judgment made and entered on the 18th day of February, nineteen hundred and eight, in the above entitled cause, does hereby appeal from the said judgment and decree to the Supreme Court of the United States for the reasons specified in the assig-ment of errors which is filed herewith, and prays that this appeal may be allowed and that a transcript of the record, proceedings, and papers upon which said judgment and decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

HARTIGAN & ROHDE,
Attorneys for Plaintiff.

Dated this 24 day of March, A. D. 1908.

The foregoing claim of appeal is allowed.

JAMES F. TRACEY,
Associate Justice.

Dated this 24 day of March, A. D. 1908.

50 UNITED STATES OF AMERICA,
Philippine Islands:

In the Supreme Court of the Philippine Islands.

R. G. No. 4195.

THE ATLANTIC, GULF & PACIFIC COMPANY, Plaintiff,
versus
THE GOVERNMENT OF THE PHILIPPINE ISLANDS, Defendant.

The plaintiff prays an appeal from the final decree of this Court to the Supreme Court of the United States, and assigns for errors:

I.

That the Court erred in sustaining the demurrer of the defendant.

II.

That the Court erred in dismissing the plaintiff's complaint.

III.

That the Court erred in affirming the judgment of the Court of First Instance dismissing the plaintiff's complaint.

Wherefore plaintiff prays that the decree of the Supreme Court of the Philippine Islands be reversed.

(Fdo.) HARTIGAN & ROHDE,
Attorneys for Plaintiff.

51 UNITED STATES OF AMERICA,
Philippine Islands:

In the Supreme Court of the Philippine Islands.

R. G. No. 4195.

THE ATLANTIC, GULF & PACIFIC COMPANY
versus
THE GOVERNMENT OF THE PHILIPPINE ISLANDS.

Know all men by these presents: That we, the Atlantic Gulf & Pacific Company, as principal, and William J. Rohde and Thomas L. Hartigan as sureties, are held and firmly bound to the Government of the Philippine Islands in the full sum of One Thousand Dollars to be paid to the said Government of the Philippine Islands or its assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seal and dated this 24 day of March, in the year of Our Lord one thousand nine hundred and eight.

Whereas lately in the Supreme Court of the Philippine Islands, in a suit depending in said Court between the Atlantic Gulf & Pacific Company, plaintiff, and the Government of the Philippine Islands, defendant, a decree was rendered against the said plaintiff, and the said plaintiff having obtained an appeal and filed a copy thereof in the Clerk's office of the said Court to reverse the decree in the aforesaid suit and a citation directed to the said Government of the Philippine Islands citing and admonishing the same
52 to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington on the 22 day of July, 1908;

Now the condition of the above obligation is such that if the said plaintiff shall prosecute their appeal and answer all damages and

costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

(Signed) ATLANTIC GULF & PACIFIC CO.,
By WICKHAM QUINAN.

Signed, sealed and delivered in the presence of:

(Signed) ROMAN LACSON.
" CIRIACO J. BIGLAN—AWA.

Approved:

(Signed) JAMES F. TRACEY,
Associate Justice.

53 [Stamped:] Supreme Court of the Philippines, Clerk's Office. Filed Mar. 24, 1908, — M.

UNITED STATES OF AMERICA,
Philippine Islands:

In the Supreme Court of the Philippine Islands.

R. G. No. 4195.

THE ATLANTIC, GULF & PACIFIC COMPANY, Plaintiff,
versus
THE GOVERNMENT OF THE PHILIPPINE ISLANDS, Defendant.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Government of the Philippine Islands:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at the City of Washington within one hundred and twenty days from the date of this writ, pursuant to an appeal duly allowed by the Supreme Court of the Philippine Islands and filed in the Clerk's office of the said Court on the 24 day of March, 1908, in a cause wherein the Atlantic Gulf & Pacific Company is appellant and you are appellee, to show cause, if any, why the decree rendered against the said appellant as in the said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James F. Tracey, Associate Justice of the Philippine Islands, this 24 day of March, 1908.

JAMES F. TRACEY,
Associate Justice of the Supreme Court of the Philippine Islands.

Service of a copy of the within citation is admitted this 24 day of March, 1908.

GREGORIO ARANETA,
Attorney for Appellee.

54 UNITED STATES OF AMERICA.
Philippine Islands:

In the Supreme Court of the Philippine Islands.

At Law.

R. G., No. 4195.

THE ATLANTIC, GULF & PACIFIC COMPANY, Plaintiff in Error,
versus
THE GOVERNMENT OF THE PHILIPPINE ISLANDS, Defendant in Error.

Petition for Writ of Error.

And now comes The Atlantic Gulf & Pacific Company, plaintiff herein, and says:

That on or about the 9th day of January, 1908, the Supreme Court of the Philippine Islands entered a judgment herein in favor of the defendant and against this plaintiff, in which judgment and proceedings had prior thereto in this cause certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may be issued in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

(Fdo) HARTIGAN & ROHDE.
Attorneys for Plaintiff in Error.

55 UNITED STATES OF AMERICA,
Philippine Islands:

In the Supreme Court of the Philippine Islands.

R. G. No. 4195.

THE ATLANTIC, GULF & PACIFIC COMPANY, Plaintiff,
versus
THE GOVERNMENT OF THE PHILIPPINE ISLANDS, Defendant.

The plaintiff in this case, in connection with its petition for a writ of error, makes the following assignment of errors which it avers exists:

I.

The Court erred in sustaining the demurrer of the defendant.

II.

The Court erred in dismissing the plaintiff's suit.

III.

The Court erred in affirming the judgment of the Court of First Instance dismissing the plaintiff's suit.

Wherefore the plaintiff prays that said judgment may be reversed.

(Fdo) HARTIGAN & ROHDE,
Attorneys for Plaintiff.

56 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Supreme Court of the Philippine Islands, Greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said Court before you between the Atlantic Gulf & Pacific Company plaintiff and the Government of the Philippine Islands, defendant, a manifest error has happened, to the great damage of the said plaintiff, as by its complaint appears. We, being willing that the error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the City of Washington on the 22 day of July 1908, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 24 day of March, in the year of Our Lord one thousand nine hundred and eight and of the Independence of the United States of America the one hundred and thirty second.

J. E. BLANCO,
Clerk of the Supreme Court of the Philippine Islands.

Allowed by:

JAMES F. TRACEY,
Associate Justice of the Supreme Court of the Philippine Islands.

57 [Stamped:] Supreme Court of the Philippines, Clerk's Office. Filed Mar. 24, 1908, — M.

UNITED STATES OF AMERICA,
Philippine Islands:

In the Supreme Court of the Philippine Islands.

At Law.

R. G. No. 4195.

THE ATLANTIC, GULF & PACIFIC COMPANY, Plaintiff in Error,
versus
THE GOVERNMENT OF THE PHILIPPINE ISLANDS, Defendant in Error.

This 24 day of March, 1908, comes the plaintiff by his Attorney and files herein and presents to the Court his petition praying for the allowance of a writ of error, and an assignment of errors intended to be urged by it, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof the Court does allow the writ of error upon the plaintiff giving a bond according to law in the sum of One Thousand Dollars, which shall operate as a supersedeas bond.

JAMES F. TRACEY,
Associate Justice of the Supreme Court of the Philippine Islands.

58 Know all men by these presents, That We, The Atlantic, Gulf & Pacific Company, as principal, and William J. Rohde and Thomas L. Hartigan as sureties, are held and firmly bound unto the Government of the Philippine Islands in the sum of One Thousand Dollars, to be paid to the said Government of the Philippine Islands, its attorneys, or assigns; to which payment, well and truly to be made we bond ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 28th day of January in the year of Our Lord one thousand nine hundred and eight.

Whereas, lately in the Supreme Court of the Philippine Islands, in a suit depending in said court between The Atlantic, Gulf & Pacific Company, plaintiff, and the Government of the Philippine Islands, defendant, a judgment was rendered dismissing the suit of the said plaintiff and the said Atlantic, Gulf & Pacific Company having obtained a writ of error and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the said suit and a citation directed to the said Government of the Philippine Islands citing and admonishing the said Government to be and appear at a

session of the Supreme Court of the United States to be holden at the City of Washington on the 22 day of July next,

Now, the condition of the above obligation is such that if the said Atlantic, Gulf & Pacific Company shall prosecute the said writ of error to effect and answer all damages and costs if the fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

Signed, sealed and delivered in the presence of:

(Sgd.) THE ATLANTIC, GULF & PACIFIC CO.,
By WICKHAM QUINAN.
" WM. J. ROHDE.
" THOMAS L. HARTIGAN.

(Sgd.) ROMAN LACSON.
" CIRIACO J. BIGLANG-AWA.

Approved by:

(Signed) JAMES F. TRACEY,
Associate Justice of the Supreme Court of the Philippine Islands.

59 UNITED STATES OF AMERICA, *ss:*

To the Government of the Philippine Islands, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the City of Washington on the 22 day of July, next, persuant to a writ of error filed in the Clerk's Office of the Supreme Court of the Philippine Islands wherein The Atlantic Gulf & Pacific Company is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected and speedy justice be done to the parties in that behalf.

Given under my hand at the City of Manila in the Philippine Islands, this 24 day of March in the year of Our Lord one — hundred and eight.

JAMES F. TRACEY,
Associate Justice of the Supreme Court of the Philippine Islands.

Received copy this 24th day of March A. D. 1908.

GREGORIO ARANETA,
Attorney-General.

[Stamped:] Supreme Court of the Philippines, Clerk's Office. Filed Mar. 24. 1908, — M.

60 UNITED STATES OF AMERICA,
Philippine Islands:

In the Supreme Court of the Philippine Islands.

R. G. No. 4195.

THE ATLANTIC, GULF & PACIFIC CO., Plaintiff & Appellant,
vs.
THE GOVERNMENT OF THE PHILIPPINE ISLANDS, Defendant & Appellee.

Stipulation.

Now come the undersigned as counsel for the respective parties in the above-entitled and numbered cause and agree and stipulate that the motion filed by the Attorney-General in behalf of the defendant and appellee herein on March 19, 1908, and set for hearing by this Honorable Court on March 30, 1908, may be taken up and disposed of by the Court on Thursday, March 26, 1908.

Manila, March 25, 1908.

HARTIGAN & ROHDE,
Attorneys for Appellant.

(Signed) GREGORIO ARANETA,
Attorney-General for the Philippine Islands,
Attorney for Appellee.

Indorsed: "Supreme Court of the Philippines. Clerk's Office. Filed Mar. 25, 1908. 3 P. M."

61 Then follows an excerpt from the minutes of the Supreme Court of the twenty-sixth of March, 1908, which is in the words and figures following, to wit:

"The Court being in public session, the hearing of the motion of the Attorney-General to strike from the record the purported statement of W. Cameron Forbes, United States Philippine Commissioner, filed in said Cause, No. 4195, The Atlantic, Gulf and Pacific Company versus the Government of the Philippine Islands was announced, Mr. Harvey, in behalf of the Government, only appearing, the Court, after deliberation, ordered that the said motion be granted."

This order was duly notified to the parties on the 27th of March, 1908.

62 THE UNITED STATES OF AMERICA,
Supreme Court of the Philippine Islands:

I, J. E. Blanco, Clerk of the Supreme Court of the Philippine Islands, do hereby certify that the foregoing sixty-one typewritten pages constitute a true and correct transcript of the record and proceedings in the case of the Atlantic Gulf & Pacific Company, plain-

tiff in error, versus The Government of the Philippine Islands, defendant in error.

In witness whereof, I have hereunto signed my name and affixed the seal of the Supreme Court of the Philippine Islands at Manila, this twenty-third day of April, A. D. 1908.

[Seal Suprema Corte, Islas Filipinas.]

J. E. BLANCO,
Clerk of the Supreme Court of the Philippine Islands.

(Here follows map marked p. 63.)

Endorsed on cover: File No. 21,327. Philippine Islands, Supreme Court. Term No. 249. The Atlantic, Gulf & Pacific Company, appellant and plaintiff in error, vs. The Government of the Philippine Islands. Filed September 4th, 1908. File No. 21,327.

MAPS

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FOR

FILMING

IN THE

Supreme Court of the United States,

OCTOBER TERM, [redacted]
1910

No. 64.

No. [redacted]

Office Supreme Court
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JAMES H. McKEN

ATLANTIC, GULF & PACIFIC COMPANY,
Appellant and Plaintiff in Error,

vs.

THE GOVERNMENT OF THE PHILIPPINE ISLANDS.

BRIEF FOR ATLANTIC, GULF AND PACIFIC COMPANY
APPELLANT AND PLAINTIFF IN ERROR.

JAMES RUSSELL SOLEY,
H. C. DICKINSON,
Counsel for Appellant and Plaintiff in Error.

New York:
Stillman Appellate Printing Co.
1910.

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 249.

ATLANTIC, GULF & PACIFIC COMPANY,
Appellant and Plaintiff in Error,

vs.

THE GOVERNMENT OF THE PHILIPPINE ISLANDS.

BRIEF FOR ATLANTIC, GULF & PACIFIC COMPANY, APPELLANT AND PLAINTIFF IN ERROR.

(References to the Transcript of Record are to the original or side paging.)

This case comes up on appeal from and in error to the Supreme Court of the Philippine Islands. The decree, from which the appeal is taken, and upon the rendition of which the writ of error has been allowed, is a judgment for the defendant affirming a judgment of the Court of First Instance of the City of Manila, sustaining a demurrer and dismissing the complaint, on the ground, as appears from the decision, that the complaint failed to state facts sufficient to constitute a cause of action.

Statement of Facts.

The suit is brought by the Atlantic, Gulf & Pacific Company, a West Virginia corporation, against the Government of the Philippine Islands, upon a contract entered into July 24, 1905, and attached to the complaint. The contract was a contract for harbor work (Specification, Art. I, Ex. B, Transcript, p. 9), consisting of the building of a structure or work known as the "Luneta Extension," and included the construction of a rock and timber bulkhead and the dredging and deposit of material behind it.

The contract also provided for the construction of a rip-rap foundation for the extension of the East Breakwater and the concrete foundation for a lighthouse at the end of the West Breakwater, but no question arises as to these last branches of the work.

A section of the rock and timber bulkhead, is shown in the plan (at end of Transcript, p. 62), near the lower right-hand corner under the title "Luneta Extension," consisting of a vertical line of sheet-piling on the inside and of a rock revetment sloping from the top of the sheet-piling on the outside. The specifications contained a provision (Transcript, p. 7), as follows:

> "5. The contractor will be responsible for damages to the bulkhead and revetment arising from wave action or from pressure of the revetment against the timber structure; but if a break is caused by pressure resulting from the mud fill, the repairs to the structure will be paid for by the Government at the prices specified in the contract; provided that the specifications have been fully complied with."

The prices named in the contract (Transcript, p. 5) were as follows:

> For dredging and depositing of material, 24 centavos per cubic yard measured in cut.
>
> For rip-rap stone in place, 2 pesos and 60 centavos per ton.
>
> For timber bulkhead in place, 20 pesos per lineal foot.
>
> For concrete in place, 30 pesos per cubic yard.

Other provisions of the contract will be referred to as occasion arises.

The complaint alleges the commencement of the work and its progress until the 1st of May, 1906, at which time the inside fill of the bulkhead was 4 feet above mean low water (Par. III of the complaint. Transcript, p. 2).

The complaint further alleges (Par. IV. Transcript, p. 2):

"IV.

"That on the said 1st day of May, 1906, and while the said improvements were in a condition as provided for in said contract, plan and specifications, a section of about 200 feet in length of the said bulkhead and rock revetment was displaced by the pressure from the inside fill and moved a distance of about 20 feet into the waters of the Bay of Manila, and that through the opening thus caused there escaped into the Bay a large quantity of the fill that had been pumped behind the said bulkhead; that after the break in the bulkhead and rock revetment of May 1st, 1906, the plaintiff proceeded as rapidly in the repairing of the said bulkhead and revetment as it was permitted to do by the Officer in Charge representing the defendant, and in strict and immediate compliance with the orders received from the said Officer in Charge in that behalf; that thereafter and on the 18th day of May, 1906,

before the aforesaid break in the bulkhead and revetment had been or could have been repaired, a severe typhoon occurred in the Bay of Manila; that the said bulkhead and rock revetment, being without the support of the inside fill, which had escaped through the said break, were greatly damaged and completely destroyed for a distance of about 1,800 feet by the pressure of the rock revetment and the wind and waves from the outside acting against the bulkhead and revetment, which because of the escape of the heretofore noted fill, was without support from the inside; that during and after the destruction of the bulkhead and revetment, caused as last aforesaid, a large additional quantity of the inside fill escaped into the Bay of Manila."

"VII.

"Plaintiff further alleges the fact to be that if the break in the bulkhead and rock revetment of May 1, 1906, caused as aforesaid by the pressure of the inside fill, had not occurred, that then no damage whatever would have been done to said improvements, bulkhead, rock revetment or fill by the typhoon of May 18th-19th, 1906, since the said bulkhead and rock revetment, when in the condition as provided for in said contract, plan and specifications, with the fill on the inside always about even with the rock revetment on the outside and both the fill and the rock revetment being about four feet above mean low water mark, would have been sufficiently strong to resist the force of the wind and waves."

It is specially to be noted in the above extracts that the pressure of the inside fill and the break thereby caused are distinctly pleaded as the promimate and efficient cause of the entire damages alleged.

The complaint also sets forth (Par. V. Transcript, p. 3) the making of a supplemental contract between the parties to repair the damages of May 1, 1906, and a further agreement to repair the damage to the improvements on the 18th and 19th days of May, 1906, in which last agreement all rights were reserved in regard to adjudication of liabilities; the performance of the last-mentioned work, and the amount due therefor, according to the unit figures and quantities, and the demand for payment and refusal; and prays judgment in the amount so shown.

It appears from the supplemental agreement (Exhibit D, Transcript, pp. 19-21) for the repair of the injuries that took place on May 1st, that the Government decided that its engineering plan for the Luneta Extension was defective, and that accordingly it made radical changes therein. It decided "that the repairs to the structure ought to be made, not by the construction of a new bulkhead of timber and replacing of the revetment of stone, as contemplated in said contract, but it has been found advantageous and necessary to modify the project so that the repairs should be made by filling the space that has given way with rock and by filling the interstices of such rock with clay, soil, gravel or broken stone, so that the water pumped into the fill would not flow through it and thus escape, and by the erection on the top of the rock so constructed of a temporary timber bulkhead." Provision was then made for the payment of the contractor for these repairs according to the modified plans, at a sum which should equal cost plus 15 per cent., the rocks deposited to be paid for on the basis mentioned in the original specifications (Transcript, p. 21).

It is further to be noticed, in the correspondence between Lt. Col. Fisk, Corps of Engineers, U. S.

Army, the Director of Port Works at Manila, and Hon. W. Cameron Forbes, United States Philippine Commissioner, on the 25th of May, 1906, in regard to what was called the "typhoon damage," meaning thereby the damage that occurred on the 18th and 19th of May, that an informal agreement was entered into, which provided that the contractors should make these repairs also, in accordance with the modified plan adopted in the supplemental agreement, "with the understanding that all rights were reserved in regard to the adjudication of liabilities." (Transcript, p. 22.)

The result of this agreement was the performance of the work, which is the subject of the present action, consisting in the putting in place of 15,237 tons of rock and 116,000 cubic yards of fill, compensation being demanded for the material and labor in accordance with the terms of the agreement. The present action was therefore brought under the clause of the agreement providing that all rights should be reserved in regard to the adjudication of liability, and it seeks to establish the liability of the Government of the Philippine Islands for the compensation at the contract rate for the repairs to the structure caused by the injuries occurring on May 18-19, 1906.

The defendant, the Government of the Philippine Islands, interposed a demurrer to the effect that the facts stated in the complaint did not constitute a cause of action. The demurrer was sustained by the Court of First Instance (Order, pp. 23-25) and judgment rendered dismissing the complaint (Transcript, p. 25). On appeal to the Supreme Court of the Philippine Islands, the judgment was affirmed, the grounds of the decision being stated in the opinion of the Court (two Justices dissenting; Transcript, pp. 27-37). The conclusions of the

learned Judge will be considered as occasion arises in the argument

Exception was taken to the decision and to the denial of a petition for a rehearing (Transcript, pp. 37-44). Thereupon an appeal was taken to this Court and a writ of error issued (Transcript, pp. 53, 56). The errors assigned are that the Court erred (1) in sustaining the demurrer; (2) in dismissing the suit; and (3) in affirming the judgment of the Court of First Instance (Transcript, p. 55).

POINT I.

A demurrer should not be sustained if, upon any fair and liberal interpretation, a cause of action can be implied from the averments of the complaint.

The hearing upon the demurrer, of course, starts with the proposition that all the averments of the complaint must be taken as established.

It may, and in fact frequently does, happen that a pleading is obscurely or inartificially drawn, and that its averments are confused and imperfectly stated. It is, however, not only the tendency, but a governing principle, of modern decisions on the subject that the court in considering the question of sustaining a demurrer shall, as far as possible, go behind all obscurities and ambiguities, and, adopting a liberal rule of construction, seek to give effect to any averments or implications, or even any elements going to make up an averment from which a cause of action may be spelled out. The language of the decisions goes very far in this re-

spect. Thus, it was stated by Mr. Justice PECKHAM in commenting upon the construction of pleadings:

> "All pleadings must be construed reasonably and not with such strictness as to refuse to adopt the natural construction of the pleading because a particular fact might have been more distinctly alleged, although its existence is fairly, naturally and reasonably to be presumed from the averments made in the pleading."
>
> *Lockhart* v. *Leeds*, 195 U. S. 427, at p. 435.

Says Mr. Justice HOLMES, in considering upon demurrer the sufficiency of a bill:

> "Whatever may be thought concerning the proper construction of the statute, a bill in equity is not to be read and construed as an indictment would have been read and construed a hundred years ago, but it is to be taken to mean what it fairly conveys to a dispassionate reader by a fairly exact use of English speech. Thus read this bill seems to us entitled to allege successive elements of a single connected scheme. We read the demurrer with the same liberality."
>
> *Swift & Co.* v. *U. S.*, 196 U. S. 375, at p. 395.

In a comparatively recent case in the New York Court of Appeals, it was said by MARTIN, J:

> "The facts stated are admitted by the demurrer. Hence, the only question is whether a cause of action is alleged or can be fairly gathered from all the averments contained in the complant. A demurrer upon that ground can be sustained only when it appears that, after admitting all the facts alleged or that can by reasonable and fair intendment be implied from them, the complaint fails to state a cause of action.

"Under the more recent authorities, pleadings are not to be construed strictly against the pleader, but averments which sufficiently point out the nature of the pleader's claims are sufficient, if under them he would be entitled to give the necessary evidence to establish his cause of action. Citing, *Rochester R. Co.* v. *Robinson*, 133 N. Y. 242, at p. 246."

Coatsworth v. *Lehigh Valley R. Co.*, 156 N. Y. 451, at p. 457.

"When, therefore, the plaintiff's complaint may reasonably import the averment of a good cause of action, it is not to be held bad on demurrer because its language is susceptible of a construction excluding any such cause."

Olcott v. *Carroll*, 39 N. Y. 436 (headnote).

A similar rule is applied by the New York Appellate Division:

"If the reasonable import of a complaint is a cause of action, a demurrer does not lie because the language of the complaint permits an exclusion of such cause of action."

Naylor v. *N. Y. C. & H. R. R. Co.*, 119 App. Div. 22, at p. 28.

Mr. Justice SUTHERLAND states the principle clearly in the following language:

"Nor is it good cause of demurrer that the plaintiff asks in his complaint for more than it shows he is entitled to, for relief that he is not entitled to, or for further relief than he is entitled to. Nor is the insertion in the complaint of redundant or impertinent matter, or of irrelevant or unmeaning verbiage, cause of demurrer. (Watson v. Husson, 1 Duer 242; Smith v. Greenin, 2 Sandf. 702; Richards v. Edick, 17 Barb. 260; Hammond v. Hudson River Iron and M. Co., 20 Barb. 386; 11 How. Pr. R. 218.) On demurrer to such a complaint,

on the ground that it contains no cause of action, it is the duty of the court to uncover the mass of heterogeneous facts and to sort out and arrange them; and if it is found that any lot or parcel of them, when arranged and placed together, will stand alone as a cause of action, it is the duty of the court to overrule the demurrer."

People v. *Mayor of New York*, 28 Barb., 240, at p. 248.

"A demurrer to a complaint for insufficiency can only be sustained when it appears that, admitting all the facts alleged, it presents no cause of action whatever. It is not sufficient that the facts are imperfectly or informally averred, or that the pleading lacks definiteness or precision, or that the material facts are only argumentatively averred. The complaint on demurrer is deemed to allege what can be implied from the allegations therein by a reasonable and fair intendment, and facts impliedly averred are traversable in the same manner as though directly averred (Sanders v. Soutter, 126 N. Y., 193; Zebley v. F., L. & T. Co., 139 *id.*, 461; Kain v. Larkin, 141 *id.*, 144)."

Ketchum v. *Van Dusen*, 11 App. Div., 332, at p. 335.

Applying the above principles, it appears that this plaintiff has pleaded a series of averments from which a cause of action may be clearly inferred. We freely admit that the pleading is inartificially drawn; that in some points it is obscure and even, perhaps, containing apparent contradictions; but, nevertheless, it clearly appears that from it a statement may be drawn that the work which was the subject of this contract suffered serious injury by reason of the pressure of the fill upon the enclosing bulkhead; that, under the terms of the contract, the defendant, the Government of the Philippine

Islands, was required to pay for the repairs to the structure so caused; that the Government disputed its obligation; that, for the convenience of all parties, they agreed that the work should be done, all rights being reserved in regard to the adjudication of liability; that the work actually was done; and that the prices named in the complaint are the prices specified in the contract, for which the contractor now sues. Surely, such a complaint must be held to state a cause of action, unless grave reasons can be shown for dismissing it and sustaining a demurrer.

POINT II.

The break of May 1, 1906, due to the pressure of the fill upon the enclosing bulkhead, was the proximate cause of the subsequent injury to the work, for the repair of which compensation is demanded in the complaint.

The Luneta Extension, as appears from the complaint and the annexed papers, was an extensive structure extending into the Bay of Manila from that part of the city known as the "Luneta," and was composed of material dredged from the Bay and deposited as "fill" on the site, the intention being that it should be protected and held in place by a line of sheet piling composing a bulkhead, with a revetment or sloping wall on the outside made of rip-rap, that is to say, loose stones piled up in front of the bulkhead. The plan of the structure was afterwards changed so that the revetment and permanent bulkhead were in part done away with

and rock was used instead of dredged material for a part of the structure, the interstices of the rock being filled with clay, soil, gravel, or broken stone, constituting a certain sort of impermeable cement.

The complaint sets forth that on the first day of May, 1906, while the structure (called in the complaint the "improvements") was in the condition as provided in the contract, plan and specifications, a section of about 200 feet in length of the bulkhead and rock revetment enclosing the work was displaced by pressure from the inside fill and moved a distance of about 20 feet into the waters of the Bay of Manila, and that through the opening thus caused there escaped into the Bay a large quantity of the fill that had been pumped behind the bulkhead. This was, of course, before the change was made in the plan of the structure. After the break in the bulkhead and rock revetment of May 1st, the contractor proceeded as rapidly in repairing the work as it was permitted to do by the officer in charge representing the defendant, and in strict and immediate compliance with his orders. Thereafter, and on the 18th day of May, before the break in the bulkhead and revetment had been or could have been repaired, the bulkhead and revetment that were still standing, being unsupported by the inside fill which had escaped through the break of May 1st, were completely destroyed for a distance of 1800 feet, and a large additional quantity of the inside fill escaped into the Bay.

The physical forces that were in operation on May 18th and 19th, which caused the destruction that then took place, were the action of the wind and waves exerted from the outside against the revetment and bulkhead—the latter sustaining the pressure of the water as well as of the intervening

rock. While these were the forces that were actually in operation during the storm then in progress, the damage could not have taken place if the break in the bulkhead and revetment on May 1st, caused by the pressure of the inside fill, had not occurred, the reason being that the fill on the inside, which was standing in place until the break of May 1st, offered a complete and solid resistance to the force of the wind and waves. Had it not been that the fill had been allowed by the break of May 1st to slide out into the water and so deprive the revetment and bulkhead of support, the further damage of the 18th and 19th of May would not have occurred.

As the Government was expressly made responsible by the contract for a break caused by the pressure of the fill from the inside, plaintiff claims that it is chargeable with the repairs for the injuries that supervened not only on May 1st, but also on May 18 and 19, the injuries of the latter dates being directly traceable to the pressure of the fill and the resultant break of May 1st, and the entire series of events from the disastrous pressure of this fill to the general wreckage of the structure on the 18th and 19th of May being merely links in the chain of cause and effect.

It will be seen at once that the question here is the familiar question of proximate cause, in reference to which no clearer and more convincing conclusions are to be found than those of this Court.

It will be further seen that the pressure of the fill is distinctly pleaded as the proximate cause of the injuries of May 18-19, as well as of May 1st.

The rule is stated at length by Mr. Justice STRONG in his opinion in the leading case of Mil-

waukee & St. Paul R. Co. v. Kellogg, which has been repeatedly followed:

> "The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market place. 2 Bl. Rep. 892. The question always is, Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."
>
> * * * * * *
>
> "In the nature of things, there is in every transaction a succession of events, more or less dependent upon those preceding, and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independ-

> ent agencies, and this must be determined in view of the circumstances existing at the time."
>
> *Mil. & St. Paul R. Co.* v. *Kellogg*, 94 U. S. 469, at pp. 474, 476.

The question is not one of nearness or remoteness of time. In the case of Insurance Company v. Boon, Mr. Justice STRONG, again dealing with the question of proximate cause, states the principle as follows:

> "The question is not what cause was nearest in time or place to the catastrophe. That is not the meaning of the maxim *causa proxima, non remota spectatur.*
>
> "The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result."
>
> *Ins. Co.* v. *Boon*, 95 U. S. 117, at p. 130.

In the same case, at p. 131, the court says, citing Ins. Co. v. Tweed, 7 Wallace 44:

> "There it was, in effect, ruled that the efficient cause, the one that set the others in motion, is the cause to which the loss is to be attributed, though the other causes may follow it and operate more immediately in producing the disaster."

In the case of *The G. R. Booth*, a ship was being unloaded at her dock in port, when a case of detonators in her hold exploded, without fault of anyone, the explosion making a large hole in the side of the ship through which water poured, entering the hold and damaging other goods. The bill of lading provided that the carrier "shall not

be liable for loss or damage caused by perils of the sea." In delivering the opinion, Mr. Justice GRAY, after citing the cases above referred to and others, held as follows:

> "In the case at bar, the explosion of the case of detonators, besides doing other damage, burst open the side of the ship below the water line, and the sea water rapidly flowed in through the opening made by the explosion, and injured the plaintiff's sugar. The explosion, in consequence of which, and through the hole made by which, the water immediately entered the ship, must be considered as the predominant, the efficient, the proximate, the responsible cause of the damage to the sugar, according to each of the tests laid down in the judgments of this court, above referred to. The damage to the sugar was an effect which proceeded inevitably, and of absolute necessity, from the explosion, and must therefore be ascribed to that cause. The explosion concurred, as the efficient agent, with the water, at the instant when the water entered the ship. The inflow of the water, seeking a level by the mere force of gravitation, was not a new and independent cause but was a necessary and instantaneous result and effect of the bursting open of the ship's side by the explosion. There being two concurrent causes of the damage—the explosion of the detonators, and the inflow of the water—without any appreciable interval of time, or any possiblity of distinguishing the amount of damage done by each, the explosion, as the cause which set the water in motion, and gave it its efficiency for harm at the time of the disaster, must be regarded as the predominant cause. It was the primary and efficient cause, the one that necessarily set the force of the water in operation; it was the superior or controlling agency, of which the water was the incident or instrument. The inflow of the sea water was not an

> intermediate cause, disconnected from the primary cause, and self-operating; it was not a new and independent cause of damage; but, on the contrary, it was an incident, a necessary incident and consequence, of the explosion; and it was one of a continuous chain of events brought into being by the explosion—events so linked together as to form one continuous whole."
>
> *The G. R. Booth*, 171 U. S., 450, at p. 460.

Applying these principles to the present case, we find that the recital of the events in connection with the Luneta Extension work, as set forth in the complaint, show that the dominant and efficient cause—the proximate cause in short—of all the injury, for the repair of which compensation is sought, was the pressure of the fill upon the enclosing wall or bulkhead. All that followed was the mere operation of the forces of nature in a manner to have been foreseen and expected. The fill exerted its destructive pressure upon the bulkhead. The bulkhead gave way. Through the opening 200 feet wide thus formed, the fill passed out not only from behind the spot where the bulkhead had given way, but from the contiguous area. The bulkhead and revetment were thus left without support.

Now, the bulkhead and revetment could not stand without support. This will be plain from the merest observation of the sectional diagram at the end of the transcript of record. The revetment extended out into the water of the bay. Its upper part was about seven feet above the line of mean low water. The submerged part, as appears from the diagram, was about 10 feet. The pressure of the water which exerted itself at the outer face of the bulkhead and against the revetment, was exerted entirely on the face of the structure. This

was assuming that the water was in a condition of repose. The water, however, did not remain in a condition of repose. No water does. In stormy weather, the action of the waves against the bulkhead and revetment would exert a force far greater than that of the pressure of the water in repose. In point of fact, in a large open sheet of water, like the Bay of Manila, a condition in which there is no wave action is the exception, rather than the rule. The action of wind upon waves causing disturbance, creates irregular and violent pressures that must be considered a normal condition of a large body of water. The energy exerted by these forces of nature is oftentimes of tremendous power, and its effect in erosion, disintegration, pounding and battering, and generally disturbing and destroying that with which it comes in contact, must be recognized as a part of the natural course of events and as ordinary phenomena in the operation of natural laws.

The court will take judicial notice of familiar natural phenomena and of natural laws which are matters of general knowledge, such as the laws of meteorology and of physical geography. It is not necessary to allege in a pleading such facts as the effect of wave action, the pressure of a large body of water against an unsupported wall, or the prevalent liability to typhoons in the waters surrounding the Philippine archipelago. It has been held that judicial notice will extend to well-known climatic conditions that may exist in certain localities that are known by virtue of the fact that they are part of the general history of the land.

McGhee Irrigating Ditch Co. v. *Hudson*, 21 S. W. Rep. 125.

Even such a matter as the limitations in reference to weather suitable for yachting have been made the subject of judicial notice by this court.

The Conqueror, 166 U. S. 110, at p. 134.

Doubtless the prevalence of typhoons in and about the Philippine Islands is not as familiar to us in America as it is to the inhabitants of the Islands themselves; but the fact is, as could be shown by innumerable authorities, that during the months of April and May in particular these cyclonic storms are of constant occurrence, and may be expected as a part of the normal meteorological conditions of the country. So familiar are these facts in the Philippines, where this case was to be tried, that it is impossible to suppose that the local courts would not take judicial notice of them.

Of the two groups of facts or events which we are here considering in connection with the ultimate result, namely, the destruction of a portion of the work on May 18th and 19th, it must be considered, in the light of the principles laid down by the authorities cited, that the *causa causans*, the efficient and dominating cause, was the failure of the enclosing wall to support the pressure of the inside fill. This was the cause that set in motion the train of circumstances which produced the ultimate result. It is alleged in the complaint, in terms which are neither obscure nor ambiguous, as being the efficient cause. Any events which followed, to which the character of causation could be attributed, were merely the natural, necessary and readily foreseen manifestations of natural forces operating in the natural way. They reduce themselves simply to the pressure of water in motion; in other words, to wave action, in a locality where hurricanes during these months of the year are

a matter of daily occurrence. The case of *The G. R. Booth*, cited above, is a case singularly in point. An explosion occurred, by which the side of the ship was blown out. The water, following the operations of natural laws, thereupon sought its level. The injury to the cargo, which was the subject of the action, was directly caused by the water; but the efficient, dominating and proximate cause was, nevertheless, held to be the explosion. The action of the water consequent upon the explosion was merely a circumstance by which natural forces, acting upon the conditions produced by the explosion, asserted themselves according to well-known and natural laws. In precisely the same way, in the case at bar, when the pressure of the fill had been exerted against the bulkhead on the 1st of May and had caused the break by which the fill was allowed to escape into the water and the support to be removed from the remainder of the external wall, the action of the waves, operating under natural laws, completed the work of destruction which the pressure of the fill had set in motion.

The interval of a fortnight or so between the proximate efficient cause and the ultimate result is of no importance. This question is settled by the *Boon* case, *supra*. Nearness in time or place does not affect the situation. As Mr. Justice STRONG says:

> "The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation."

When the learned Justice adds that

> "the causes which are merely incidental or instruments of a superior or a controlling agency are not the proximate causes and the responsible one, though they may be nearer in time to the result,"

he states a principle which applies directly in the case at bar. The effects of wave motion were "instruments of a superior or controlling agency." They were events naturally to be expected in the conditions surrounding this work. If you build a structure from the land into the water, you subject it to the influences of wave motion as certainly as an aviator subjects himself to varying currents of air. Such influences become a part of the necessary conditions of existence.

Take any of the tests laid down by the authorities and apply them to this case. Take the test, for instance, laid down in the *Milwaukee & St. Paul R. R. Co.* case, that "It must appear that the injury was the natural and probable consequence of the negligence." The negligence consisted in allowing the pressure of the fill to overcome the enclosing wall, causing the break by which the fill itself escaped. Given the break, the escape of the fill is the natural consequence of the break; the destruction of the inside support of the bulkhead is the natural and necessary consequence of the escape of the fill; the unrestricted operation of the wave motion on the wall and its consequent wreckage are the natural and probable consequence of the want of support. Or, again, take the test that "It ought to have been foreseen in the light of the attending circumstances." Every one of these consequences, constituting a perfect chain of cause and effect, could have been foreseen, as surely as that night would follow day or that any other law of nature would assert itself.

In the case of *Milwaukee and St. Paul R. Co.* v. *Kellogg*, cited *supra*, Mr. Justice Strong lays it down as "the true rule" that the question of proximate cause is ordinarily a question for the jury, "to be determined as a fact." If this principle is controlling, the demurrer should not be sustained.

POINT III.

The liability of the defendant is not affected by Paragraph 5 of the specifications.

So complete and incontrovertible is the application of the well-established principles of law relating to proximate cause to the case at bar that the learned Justice of the Supreme Court of the Philippine Islands who delivered the opinion in the decision from which this appeal is taken, virtually conceded it in so far as the general facts of the case were concerned. He says (Transcript, p. 33):

> "As a consequence we should be led to the conclusion that the proximate cause of the damage was not the typhoon * * * but rather the over-pressure of the fill, producing the escape of the material and the weakness of the bulkhead which rendered the destruction by the typhoon possible."

He asserts, however, that by paragraph 5 of the Specifications the contracting parties, while constituting a break caused by pressure of the fill a cause for damages for which the Government should pay, have also constituted wave action as an independent cause, the damages for which should be paid for by the contractor, and upon this ground he insists that the case should be taken out of the ordinary rule of law and that wave action should be considered as an independent cause, made so by the contract, for which the contractors have agreed to be responsible.

This suggestion must be carefully examined.

It would here be well again to quote the language of this paragraph. It is as follows:

> "5. The contractor will be responsible for damages to the bulkhead and revetment aris-

ing from wave action or from pressure of the revetment against the timber structure; but if a break is caused by pressure resulting from the mud fill, the repairs to the structure will be paid for by the Government at the prices specified in the contract; provided that the Specifications have been fully complied with."

The complaint alleges that the Specifications were fully complied with; therefore, this condition may be taken as fulfilled.

Superficially considered, Paragraph 5 appears to provide for two different classes of injury to the work by the operation of certain forces; in the first case forces operating on or from the outside due to wave action and the accompanying pressure of the revetment against the timber bulkhead; in the second case, to forces operating on or from the inside and arising from the pressure of the fill upon the bulkhead. It might therefore appear to the casual observer that all that was contemplated was that a certain balance or equilibrium should be maintained between inside and outside pressures during the progress of the work by making one party, namely, the contractor, responsible for the excess of outside pressure, and the other party, namely, the Government, responsible for the excess of inside pressure.

This, however, is not the meaning of the provision.

Upon a careful analysis, two important facts are to be noted in connection with this clause. They are as follows:

First, the pressure referred to from the outside is a pressure due to natural rather than artificial causes. It is primarily the action of the water exerted either by pressure against the revetment and transmitted by the revetment to the bulkhead, or it is wave action, which is a force equally due to

natural causes but far more destructive and powerful in its operation. These forces, while they may vary considerably in degree, according to meteorological conditions, are forces that are normal, always in operation and due to the physical situation as Nature made it.

The pressure referred to from the inside, on the other hand, is a pressure due to artificial causes alone. It is the force exerted by the fill artificially placed on the inside of the bulkhead. If the force exerted is too great for the protecting wall, it is an indication that the engineering plan adopted is imperfect. The Government, as being responsible for the engineering plan, is therefore made responsible for all destructive consequences that may ensue to the entire structure. Accordingly, it was so prescribed in the contract.

Secondly, the two provisions of this paragraph of the contract with respect to responsibility, or the two conditional rules of damage which they impose, *are not co-ordinate*. The paragraph does not merely state that the contractor is liable for certain damages on the one hand, and that the Government is liable for certain damages on the other. It states that the contractor shall be generally liable for damages resulting from certain contingencies, *but* if the damages are due to certain other contingencies the Government shall pay for them. The two clauses are not merely conjunctive; they are disjunctive. The first represents a general provision; the second is a controlling exception. The first is therefore subordinate; the second is paramount. The first states the general situation as to the operation of causes that are natural, normal and always present in a greater or less degree; the second states the exceptional condition, showing the new obligations of the parties that would arise

even though these normal causes were present (as they always must be), provided that certain other superior and exceptional causes supervened.

Whether we proceed further with this analytical process, or whether we apply the ordinary principles of common sense to the construction of this paragraph, we reach the same result. The fact is plain that wave action is operating all the time upon this external surface of the structure. It operates in a great variety of ways. It may be, as it were, erosive; it may have a scattering effect; it may disturb the position of a single stone half way down the wall which will displace a number of other stones. If the effects of such a disturbing influence are allowed to go on, they may uncover the bulkhead and the pounding effect of the waves may cause the destruction or displacement of some of the piles. It is made the duty of the contractor under these circumstances to repair these damages at his own expense. He is to keep the revetment and the bulkhead behind it—and only the revetment and the bulkhead —in good condition. It may require constant watchfulness and daily repairs of a minor character to counteract this constantly disturbing influence of the waves and to remedy its effects. It is obviously in line with this interpretation of the contractor's duty that the responsibility of the contractor in this paragraph is for damages to the bulkhead and revetment and not to anything else. The replacement of the fill, which is by far the most important part of the structure, is not suggested.

The contract, therefore, says to the contractor: "You must make good the wear and tear of the bulkhead and revetment caused by wave action; but," it adds, "if a break is caused by pressure resulting from the fill, the repairs to the structure (not alone the bulkhead and revetment) will be paid for by the

Government." In other words, the contractor is called upon as a general proposition to take care of the bulkhead and revetment and to repair the damage caused by the ever present wave action. But, notwithstanding this obligation and in the face of it, if a break is caused by the pressure of the fili, the repairs to the structure resulting therefrom will be paid for by the Government.

Such a provision as this cannot be said to interpose wave action as an intervening efficient cause where the destruction was originally brought about by the inside pressure with its attendant consequences of the escape of the fill and the withdrawal of support from the bulkhead. The second provision is a qualification of the first. The first cannot be considered as the addition of a separate, distinct and independent obligation. The respective obligations of the parties can in no way be considered separate and distinct. They constitute a general obligation imposed upon one, limited and qualified by a superior obligation imposed on the other. The provision in question, in terms, limits the contractor's general responsibility, in the case of a break due to the pressure of the fill, and in such a case relieves the contractor of his liability for the sufficiency of that portion of the structure affected by the break and the resultant withdrawal of support of the wall, until these conditions shall have been remedied. According to the learned Judge below, external wave pressures, including storms and typhoons, are constituted independent causes of damage, for the consequences of which the contractor expressly agrees to be responsible; and in support of this statement, he recites the words—"The contractor will be responsible for damages to the bulkhead and revetment arising from wave action." The trouble is that he leaves out the "but"

which introduces the following clause, and it is a very large and important "but." It destroys entirely the theory of a stipulation that wave action shall be a separate, independent cause of damage. Wave action is a cause of damage that devolves upon the contractor responsibility for repairs to the bulkhead and revetment, but only where the damage has not been brought about by pressure from the fill.

The opinion makes another and very grave mistake by inserting the word "all" before "damages" (Transcript, p. 33). In the above quotation the word all has been omitted, and the passage restored to its original form. It is evident that the Court was under the mistaken impression that the contract referred to *all damages* arising from wave action, which would give the clause a very different meaning.

POINT IV.

The responsibility of the contractor for damages, arising from wave-action as an independent cause, so far as it is based on paragraph 5 of the specifications, is expressly limited to certain specific forms of damage, and leaves the responsibility for other resultant damages subject to the general rule.

The position taken by the Court below has been discussed in connection with Par. 5. It remains to consider it in another aspect.

The contention is that the contract made the contractor liable for damages resulting from wave

action as from an independent cause, and that, therefore, the pressure of the fill, although, admittedly, the dominant and efficient cause, cannot devolve this responsibility upon the Government.

In reference to this, it is to be observed that Paragraph 5 expressly limits the contractor's liability on account of the effects of wave action to repairs to the bulkhead and revetment. No responsibility is imposed upon him for repairs on account of the loss of the fill. On the other hand, the responsibility of the Government for damages resulting from the pressure of the fill is not limited in any way whatsoever. The provision here is that "*the repairs to the structure* will be paid for by the Government," which, of course, includes not only the bulkhead and revetment, but the entire work, and, particularly, the fill. In case any doubt as to the meaning of the language used on this subject should exist, it is entirely removed by the supplemental agreement, Exhibit D, which, in spite of its many obscurities, plainly includes the fill as a part of the repairs that "ought to be paid for by the Government in accordance with Paragraph 5 of said specifications." (Transcript, p. 20.) It accordingly proceeds with its recital that "it has been ascertained that *to fill the space* made by the giving way of the previously existing bulkhead would require approximately 3000 tons more or less of stone, 1500 tons more or less of clay, soil and gravel or broken stone, and 200 lineal feet more or less of temporary timber bulkhead." It then proceeds to provide for the supply and putting in place of the material referred to.

It appears from the above that the contractor is responsible for damages arising from wave action solely to the bulkhead and revetment. The

theory of an independent cause interposed between the proximate cause and its ultimate effect, which plays such an important part in the decision of the Insular Court, is limited in its application to a responsibility for these specific damages. No responsibility for damages to other parts of the work arising from the supposed intervening cause is provided by the contract. But the contractor's work, for which he now seeks compensation, was not confined to the bulkhead and revetment; it extended to the entire structure, wherever the fill had been displaced. In fact, it did not include the bulkhead and revetment of the original contract at all, for both of these were eliminated in the new contract. Neither did it include the fill as it originally existed, for the new contract provided for a structure of a totally different character, built of totally different materials.

Apart from the question of the changes in the plan of the work which will be referred to under the next point, there is nothing, even upon the theory of Mr. Justice Tracy's decision, that would prevent the contractor from suing and recovering for the repairs to the fill as distinguished from the repairs to the bulkhead and revetment. As to the former, the contract imposed no obligation. It suggested nothing about an independent cause creating such an obligation. The demurrer cannot be sustained if any part of the cause of action is good, and whatever may be said of the claim for compensation for all the work set forth in the complaint, there can be no question as to that part of it which relates to the escaped fill, which the contractor was under no specific obligation to restore, and the damage to which, even according to the theory of the learned Judge below, was not an injury of which the contracting parties had "recognized exterior pressure as an independent agent."

In this connection it is respectfully urged that especial attention be given to an admission on the part of the Government, in one of the documents attached to the complaint, that the contractor was not responsible for all of the damages of May 18 and 19. The admission is made by Lt. Col. Fisk, Corps of Engineers, U. S. Army, in charge of Port Works, the successor in office of Major Townsend, who signed the original contract. It occurs on page 22 of the Transcript, in Col. Fisk's telegraphic report to Commissioner Forbes of May 25, 1906. "*For most of typhoon damage,*" says Col. Fisk, "*I hold contractors responsible;* they claim Government responsible *for all* on account delay in repairing first break, but wish to make repairs in manner authorized for first break, leaving settlement of liability to be determined later."

We can only conjecture what the repairs were for which the engineer officer was ready to admit responsibility. It may have been the fill, which the Insular Court seems to have thought was included in the "bulkhead and revetment." Whatever it was, it is certain that there was a residuum of damage, after the performance of all his obligations by the contractor, for which the engineer officer admitted that the Government should pay; but even this the contractor is cut off from proving by the dismissal of the complaint.

POINT V.

The supplemental agreements constitute an important additional support for plaintiff's cause of action.

As to the first agreement, that of May 24, 1906, it is perfectly plain from the course of events,

as shown in Exhibit D (Transcript, pp. 19-21) and Exhibit E (Transcript, pp. 22-23) that what the parties intended to do, and substantially what they did in reference to repairs, was to separate the two groups of injuries—one, the injuries arising on May 1st, the other, the injuries arising on May 18th and 19th, which for the sake of distinction, they alluded to roughly as the "damages from the break," and the "damages from the typhoon." These expressions have no particular significance. They are merely used as convenient designations. As to the injuries of May 1st, the Government admitted its responsibility and made a specific supplemental contract to pay for the repairs to the entire structure affected thereby. Perhaps it would not have made a formal contract had it not been that in making the repairs, it changed the entire plan of the work, and rebuilt its inside structure, in so far as it had been carried away, of rock, with clay and other material used as a cement to fill the interstices, dispensing entirely with the original fill, revetment and bulkhead. This in itself is sufficient to account for the execution of the instrument referred to as Exhibit D. As to the damages that occurred on May 18th and 19th, the parties agreed that the repairs to the entire structure should be made by the contractor as in the case of the damages occurring on May 1st, but that the rights of both parties should be reserved in regard to the adjudication of liability.

There is no recital in Exhibit D which touches upon the question whether the damages of May 18th and 19th resulted from the break of May 1st or not. On the contrary, the instrument carefully avoids stating that the repairs for which it provides are all the repairs made necessary by the break. In terms, it neither includes nor excludes them.

Neither does the second agreement, providing for the repair of the damages of May 18th and 19th, touch upon this question. The contractor agrees to make the repairs, and all his rights, including his right to claim compensation for them upon whatever ground, are reserved. He is now making that claim.

There is one aspect of these agreements, however, which vitally affects the fundamental questions arising on this demurrer. Let us assume for the sake of that argument, although we deny it, that the theory of an independent cause expressed in the decision is correct; that by reason of paragraph 5 of the specifications, it must be held as matter of law, that although the pressure of the fill was the proximate cause of the final disaster, the reference to the contractor's liability for wave action constituted it an independent cause, and made the contractor responsible for restoring the structure. If this assumption were correct, the contractor must make good the damage due to wave action But this obligation is limited by the terms of the contract. In the first place, as we have already shown, the damages for which the contract holds the contractor are confined to damages to the bulkhead and revetment; they do not include the rest of the structure. In the second place, to whatever part of the structure the obligation to repair has reference, it can only relate to the structure described in the contract. In no case can it include an obligation to build another structure, or to rebuild the original structure otherwise than as the original contract and specifications prescribe.

The whole question here is whether the contractor was obligated to do the work set forth in the complaint without payment from the Government. This work was not work which the original contract called for. It was a totally different work. The

original contract provided for dredging material and for pumping it on the site, and for building the revetment and the permanent bulkhead, the last consisting of piles driven 20 feet into the bottom. The new contract under which the work was done for which payment is demanded in the complaint, required the restored fill to be made of rock cemented with clay, gravel or other substances, and substituted a temporary bulkhead on the top of the work for the bulkhead called for by the contract. This change in the work was recognized and prescribed in the supplemental contract, Exhibit D. The document says:

> "Whereas, it has been determined that the repairs to the structure ought to be made, not by the construction of a new bulkhead of timber and replacing of the revetment of stone, as contemplated in said contract, but it has been found advantageous and necessary to modify the project so that the repairs should be made by filling the space that has given way with rock and by filling the interstices with clay, soil, gravel, &c. &c."

The supplemental contract therefore prescribes an entirely new work, and frankly so states. The informal agreement of May 25 adopts these changes. This was the work which the contractor agreed to do reserving all his rights as to compensation.

Now, whatever may be said about the obligation to restore the old contract work for nothing, no reason whatever can be shown why the contractor should do the new work for nothing. He is certainly entitled to recover as for an implied contract upon the basis of a *quantum meruit*, if for nothing else. But it is not necessary to fall back on a *quantum meruit*, as an independent basis of compensation. The supplemental contract itself supplies the rate of compensation, and whether taken as a stip-

ulated rate or as a *quantum meruit*, the contractor who has done the work, reserving all his rights to compensation, is entitled under the law to receive it. There is nothing whatever in the series of instruments or transactions, from beginning to end, that required the contractor to do the new work set out for the first time in Exhibit D, without receiving as compensation what the work was reasonably worth.

Viewed in this light, if in no other, the complaint unquestionably sets out a cause of action.

POINT VI.

The question of ambiguity in the contract.

Either the provisions of the contract are as stated in the present brief or else they are ambiguous and require interpretation. Judge Tracy's decision concedes that the contract is at least ambiguous (Transcript, p. 36). If this be true, the questions raised in this proceeding cannot be settled by sustaining the demurrer. If the alleged failure to state a cause of action is due in any respect to latent ambiguities in the contract, the plaintiff has the right to introduce evidence to remove these ambiguities. It is a well recognized principle that a latent ambiguity may be explained by evidence *aliunde*.

> Clay v. Field, 138 U. S. 464, headnote, and at p. 480.

To sustain a demurrer in such a case is to cut off the right of plaintiff to show whether he has a cause of action or not.

POINT VII.

The judgment should be reversed.

Respectfully submitted,

JAMES RUSSELL SOLEY,
H. C. DICKINSON,
Counsel for Appellant and
Plaintiff-in-Error.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1910.

Supreme Court, U. S.
FILED.
DEC 14 1910
JAMES H. McKENNEY,
Clerk.

No. 64.

ATLANTIC, GULF & PACIFIC COMPANY,
Appellant and Plaintiff in Error,

vs.

THE GOVERNMENT OF THE PHILIPPINE ISLANDS.

SUPPLEMENTAL BRIEF FOR ATLANTIC, GULF & PACIFIC COMPANY,

APPELLANT AND PLAINTIFF IN ERROR.

New York:
Stillman Appellate Printing Co.
1910.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1910.

THE ATLANTIC, GULF & PACIFIC COMPANY against THE GOVERNMENT OF THE PHILIPPINE ISLANDS.	No. 64.

SUPPLEMENTAL BRIEF FOR THE ATLANTIC, GULF & PACIFIC COMPANY, FILED PURSUANT TO LEAVE GRANTED ON THE ARGUMENT.

I.

All the authorities referred to on Respondent's Supplemental Brief are cases of insurance policies.

The present case, however, is not that of a policy of insurance. It is that of a construction contract, in which certain obligations and responsibilities are assumed by the parties, and the interpretation of this contract must be made on the basis of what the

parties intended and not upon the basis of the principles of law applied to insurance policies.

The familiar underlying principle of insurance policies is that the insurer assumes the risk of a certain event entirely irrespective of the acts or conduct of the insured. Thus, in an ordinary policy of fire insurance, the insurer takes the risk of fire whether caused directly by the negligence of the insured or not. In fact, one of the principal objects of taking out a policy of fire insurance is to insure against losses caused by the negligence of the insured. So with marine policies. In the case of *Dudgeon v. Pembroke*, cited on the supplemental brief, the underwriter issued his policy against perils of the sea, and it became immaterial whether the insured (the owner) had sent the vessel to sea in a seaworthy condition or not, and whether such unseaworthiness were a concurrent cause of the loss or not, even a cause without which the perils of the sea would not have brought about the disaster.

II.

The present contract is not a contract of insurance.

It is a contract in which it is provided in substance that, while the contractor shall be generally responsible for damages to the bulkhead and revetment arising from wave action (Article 5) and for small losses of dredged material from the fill (Article 12), nevertheless, the Government shall be responsible for the failure of the bulkheads from inside pressure and for loss of dredged material consequent thereon, to the extent that it shall pay for the repairs.

We believe that it was the meaning of these clauses that the Government assumed the respon-

sibility for the consequences not only of a break in the bulkhead from the inside pressure, but for the loss of fill consequent thereon, as expressly stated in Paragraph 12, and while the complaint is somewhat roughly and inartificially drawn, we believe that it sufficiently states the absence of support of the inside fill for which the Government was responsible as being the real reason why this damage occurred. In other words, the whole theory upon which this contract was based was that the Government would see to it that the bulkhead was sufficient to stand against the inside pressures and prevent the loss of the supporting fill without which it was plain that the bulkhead would not stand. It was an obligation directly imposed upon the Government by the contract that the bulkhead should be sufficient to retain the fill, and when the break took place and the fill was allowed to escape, the consequences of the loss of this fill to the extent of paying for the repairs were to devolve upon the Government.

III.

There is no analogy between the case of Insurance Company v. Transportation Company (12 Wallace, 194) and the present case.

The question is what is the meaning of the contract in suit. In the *Insurance Company* case, the policy stated that "the insurers took the risk of fires caused by lightning, explosions and collisions." The disaster was a fire caused by a collision. Under those circumstances, there could be but one conclusion, namely, that the insurers were responsible. Their responsibility or their freedom from responsibility had nothing to do with the fact that

damages from a collision were at the risk of the owner; their responsibility was entirely due to the fact that the policy stated that they took the risk of fire caused by collision.

The determination of the meaning of the contract in suit rests upon the circumstances surrounding that contract and the language by which responsibility was devolved upon the respective parties; and the clear intention of the contract was to make the Government responsible to the extent of paying for the repairs which were the result of losses of the fill occasioned by a break due to inside pressures.

IV.

It must be remembered that this is a demurrer, and if, upon any theory of the case, there is a possible cause of action stated in the complaint, the demurrer should be overruled.

Even upon the strict principles governing insurance cases, in case of the concurrence of two causes of loss, one insured against by A and the other by B, if the damage caused by each can be discriminated, it must be borne proportionately. See the statement of this principle in *Insurance Company v. Transportation Company*, 12 Wallace, 194, at p. 196, where it is quoted with approval from Phillips on Insurance.

As the Government admitted in Col. Fisk's telegram (Transcript, p. 16) that there was some part of the damage for which the contractors were not responsible, the plaintiff here should in any case be allowed to show that a part, if not all, of the damage lay at the door of the Government. Col.

Fisk's phrase, "For most of typhoon damage I hold contractors responsible," is, in fact, a part of the complaint, being in Exhibit E, attached thereto, and constitutes an admission of separable damages and of partial responsibility on the part of the Government, which the plaintiff should be allowed to prove.

Dec. 9, 1910.

JAMES RUSSELL SOLEY,
Counsel for Appellant and
Plaintiff-in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1910.

Office Supreme Court, U.
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JAMES H. McKENNE

No. 64.

ATLANTIC, GULF & PACIFIC COMPANY,
Appellant and Plaintiff in Error,

vs.

THE GOVERNMENT OF THE PHILIPPINE ISLANDS.

REPLY BRIEF FOR ATLANTIC, GULF AND PACIFIC COMPANY

APPELLANT AND PLAINTIFF IN ERROR.

New York:
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IN THE

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No. 64.

ATLANTIC, GULF & PACIFIC COMPANY,
Appellant and Plaintiff in Error,

vs.

THE GOVERNMENT OF THE PHILIPPINE ISLANDS.

APPEAL FROM AND IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

Memorandum Brief for the Atlantic, Gulf & Pacific Company in Reply.

I. THE EFFECT OF THE PROVISIONS OF ARTICLE 5.

It is perhaps true that neither the insurance cases nor the cases in tort cited on appellant's first brief present a complete analogy to the circumstances of this case, and the same is doubtless true of the similar cases cited on the respondent's brief. This is not a case where A had insured against wave ac-

tion, and B had insured against pressure of the fill, and the question was which party should bear the loss. It is a contract case and must be determined by principles of contract liability. For the purpose of determining this question, no better statement of principles can be found than that laid down in the citation from the work of Mr. Justice Holmes in respondent's brief, as follows:

> "As the relation of contractor and contractee is voluntary, the consequences attaching to the relation must be voluntary. What the event contemplated by the promise is—or, in other words, what will amount to a breach of contract—is a matter of interpretation and construction. What consequences of the breach are assumed is more remotely, in like manner, a matter of construction, having regard to the circumstances under which the contract is made. Knowledge of what is dependent upon performance is one of those circumstances. It is not necessarily conclusive, but it may have the effect of enlarging the risk assumed.
>
> "The very office of construction is to work out from what is expressly said and done what would have been said with regard to events not definitely before the minds of the parties if those events had been considered.
>
> "The foregoing analysis is believed to show that the result which has been reached by the courts on grounds of practical good sense falls in with the true theory of contracts under the common law."

Let us, therefore, endeavor to determine what the events are that are contemplated by the promises in these contracts, and reach the conclusion upon grounds of practical good sense.

First. As to the provision in respect to outside pressures.

As shown in our first brief, the responsibility of the contractor here is a continuing responsibility to keep up his bulkheads during the progress of the work as against the continuously destructive operation of wave action and weather. These are natural destructive agencies, always in force, the risk of which it is in every way reasonable that the contractor should take. They include also the outside pressure of the revetment on the timber bulkhead. This does not materially affect their character as natural agencies. The water pressure may be transmitted through the revetment if the revetment is sufficiently solid, but in any case both pressures operate in a manner so identical as to be indistinguishable, and both must therefore be met by a single responsibility.

Second. As to the provision in respect to inside pressures.

The inside pressure as to which the Government assumed the risk is due to purely artificial causes. It is the pressure of the fill against the bulkhead. There is a very clear and simple reason why the Philippine Government should have assumed this responsibility. As counsel for the Government has stated (p. 10), this work was done under plans specified by the Government and accepted by the contractor. The plan provided for a bulkhead of specific character and dimensions. It was not a case where the contractor agreed to deposit the fill, employing such bulkheads to protect it as he saw fit. The bulkhead was evidently experimental. There was a question whether it would be sufficient to support the fill. As a matter of fact, it

was shown by the events of the first of May that it was insufficient, and the plan of the structure was accordingly modified. It was for this reason, and this reason alone, that the Government assumed this responsibility. No other conceivable reason can be given for it.

It is contended in the respondent's brief that these two provisions of Article 5 constituted a limited insurance by direct covenant (p. 9), that they were simply a "division of responsibility for the breaks in the structure; that is to say, it contemplated that if the structure should fall one way, namely, outward, the Government should be liable for the repair of so much, while if it should fall the other way, namely, inward, the contractor should be liable for the repair of that much" (p. 4). The brief uses the strongest expressions to set forth this theory. It says that such was "the obvious meaning of the language of Article 5" (p. 4); it says that the division of responsibility was "arbitrary" (p. 4). It even eliminates from the situation the question of possible negligence by the statement (p. 11)—"Nor were these liabilities fixed with reference to any negligence, for negligence of either party might in any given case cause the break with which the contract charged the other party."

The respondent's theory is, therefore, one which ignores all possible explanations of the meaning of this provision as derived from the nature of contracts generally or from facts and circumstances of this contract disclosed by the complaint, and above all from the fact that the parties whose responsibilities it is sought to define stood in the relation of owner and builder in an ordinary contract of construction. The brief considers them

solely from the point of view of two insurers whose separate risks are defined by the paragraph.

Such is certainly not the meaning of the provisions. The responsibility of the Government and the responsibility of the contractor are not in the nature of an insurer's liability with which they are charged, irrespective of the acts of the parties and the circumstances of the occurrence. Suppose, for example, that in the case of a break in the bulkhead caused by pressure outwards, it turned out that the contractor had previously removed a part of the revetment, and that the fill exerting its pressure unopposed thereupon forced out the bulkhead. It is not to be assumed that in such a case the Government would be responsible.

On the other hand, suppose that the Government had desired to use a portion of the fill in another locality after it had been put in, and for that purpose had put a gang of men at work to remove it, so that the pressure of the waves and the revetment exerted their force upon the unsupported bulkhead and caused a break inwards. Certainly, in such a case as that the contractor would not be responsible.

An attempt, in the first case, on the part of the contractor to hold the Government liable, or an attempt, in the second case, on the part of the Government to hold the contractor liable under the covenants of Article 5, would be met at once by the principle that the contracting party under such circumstances cannot take advantage of his own breach of the contract. The conduct of the contractor in the one case and of the Government in the other, interfering with the performance of the contract, is an excuse to the opposite party for non-performance. This principle is sustained by a long line of cases of which United States v. Peck, 102 U. S., 64, is a familiar illustration.

It is doubtless to give expression to this limitation which the law in any case would impose that the clause is added at the end of Article 5, "provided that the specifications have been fully complied with," the meaning being that the responsibility shall be devolved upon one party or the other as laid down in the article, provided that the other party fulfills his obligations under the contract.

The above disposes effectually of the theory that the contractor was responsible for all injuries arising from pressure inwards and the Government for all injuries arising from pressure outwards, whatever may have been the acts of the other party.

To apply this reasoning to the facts of the present case: The Government, having been made by the contract (specification, par. 12) responsible for losses of dredged material due to failure of the bulkheads from pressure of the mud fill, found itself on the 18th of May, in this situation, namely, that owing to the break of the first of May, the mud fill back of the bulkhead had escaped and was still lacking. On the 18th of May, therefore, the bulkhead was without its inside support, and while in this condition the pressure of the revetment and the wave action destroyed it.

The absence of support from the inside, owing to the escape of the mud fill, is alleged in the complaint as one of the causes of the damage occurring on the 18th of May. It was not a remote cause. It was a concurrent cause. It was contemporaneous with the infliction of the damage. It was a condition that had existed previously and that still continued to exist. It was present at that moment, and it was a condition for which the Government was responsible.

The last paragraph of Article 12 of the specifications (Transcript, fol. 12) is in the nature of an interpretation of Article 5. It says:

> "All losses of dredged material from the fills, excepting those due to failure of the bulkheads from pressure of the mud fill, as stated in Article 5, will be measured as carefully as conditions will permit, and the computed amounts deducted from the statement for the final payment."

This exception expressly shows that the Government is responsible for all losses of dredged material due to failure of the bulkheads from pressure of the mud fill. Under these circumstances, it cannot be the intention that, where, owing to causes for which the contractor is not responsible, but the Government is, the sustaining mud fill has been removed from the rear of the bulkhead, the contractor shall still be treated as an insurer against any injury that may result from the action of the water.

II: THE QUESTION OF THE SUPPLEMENTAL AGREEMENTS.

Counsel for respondent on page 3 of his brief takes exception to our statement that the modifications made by the supplemental contract Exhibit D showed that the Government decided that its engineering plan was defective. He says "that there is no basis whatever for this suggestion. Not a scintilla of evidence or allegation exists in the record to that effect."

We beg to submit that in this statement counsel is in error. In the first place, the break of May 1st, as already explained, was due to a defective plan. It could be due to nothing else. The bulk-

head as designed with its supporting revetment was not strong enough to keep in the fill.

Secondly, the supplemental contract itself (Exhibit D) shows that the plan was defective, and that the Government so concluded. It states in terms (fol. 20) that "it has been found advantageous and *necessary* to modify the project" by the adoption of a different plan. If it was necessary to adopt a new plan to repair breaks obviously caused by the defects of the previous plan, there is no question that the previous plan was defective. It is not necessary that a specific allegation should be made in the complaint to this effect, *Res ipsa loquitur*. If the fact did not speak with sufficient certainty, the supplemental agreement does. This is also a part of the complaint.

Now, in repairing the break of May 1st and in restoring the material which had fallen out on that day, the new plan of construction was adopted. It was not a plan of construction called for by the contract. It was work for which a contract did not provide. It was provided for in the supplemental agreement Exhibit D only with reference to that portion of the work which Exhibit D covered. It was to be paid for under a new schedule.

We now come to the further contract contained in Exhibit E. The terms of this contract are defined, so far as they are defined at all, in Col. Fisk's letter of May 26th, quoting two telegrams, one from himself to the Commissioner, the other from the Commissioner to himself. Respondent's counsel seeks to draw unfavorable conclusions from two phrases in the first sentence of Col. Fisk's telegram as follows:

> "For most of typhoon damage I hold contractors responsible; they claim government

responsible for all on account delay repairing first break, but wish to make repairs in manner authorized for first break leaving settlement of liability to be determined later. Repairs should be made at once, etc."

Respondent's counsel (page 24) infers from the use of the word "wish" that the change in plan adopted in the supplemental contract, Exhibit D, was also adopted here at the instance of the contractor. Such a conclusion is not warranted by the language used. What the contractor "wished" was obviously to complete the structure and for that purpose to enter into some arrangement to do the work that the government had decided to have done, reserving the question of liability. It was not, as respondent's counsel suggests, that the contractor wished to do the work according to the new plan. The new plan was adopted by the government and the contractor wanted to finish his job.

Again, it is suggested that at this time the claim of the contractors was a claim on account of the delay in repairing the first break. Undoubtedly the question of delay entered into it then and enters into it as it is presented now. The complaint alleges that "the plaintiff proceeded as rapidly in the repairing of the said bulkhead and revetment as it was permitted to do by the officer in charge representing the defendant and in strict and immediate compliance with the orders received from said officer in charge in that behalf," and that thereafter, on the 18th of May, before the break was repaired, the second injuries occurred. It is clear that if the repairs had been made and completed before the 18th of May the second injury would not have occurred, and, therefore, in a secondary sense, they may have been said to be due to delay. The real

cause was the absence of the supporting fill behind the bulkhead and all that the question of delay means is that, if this condition for which the Government was responsible had been cured before the 18th of May, the damages would not have occurred. There is not necessarily any contradiction or even change in the attitude of the contractors as shown in Col. Fisk's correspondence and as shown in the complaint.

Obviously, however, the casual and abbreviated statement of Col. Fisk in his telegram cannot be taken as the precise definition of the basis of the contractor's claim, any more than his statement, that the contractors wish to do the work reserving the question of liability, can be taken as a request on the part of the contractors to change the plan. It would be difficult to find a contract which is expressed in terms more fragmentary and informal than that to be inferred from Fisk's telegram and Forbes's reply and the note which enclosed them. The contractors could hardly be bound either as to the foundation of their claim or as to their responsibility for change of plan in the work by the phrases used by Col. Fisk, or by any of Fisk's hasty recitals. The only recital in Fisk's telegram that seems of importance is that in which he states his own position or the position of the Government, where he says "For *most* of typhoon damage, I hold contractors responsible"; from which it is certainly a legitimate inference that for some part of the typhoon damage he did not hold the contractors responsible, although the Insular Court, ignoring this statement of Col. Fisk, denies the right to hold the Government responsible for anything.

III. AS TO THE PERFORMANCE OF WORK UNDER THE NEW PLAN.

The original contract adopted certain definite plans and specifications, according to which the work was to be done. It also contained the usual provision for changes to be made by supplemental agreements familiar in all Government contracts.

The first supplemental agreement of May 24 (Ex. D), providing for the injuries which took place on May 1st, devised a new plan for that work, stating that it was necessary so to modify the project. The second agreement of May 25th, providing for the repairs of the damage of May 18th, also adopted the new plan for that work, but reserved the question of the adjudication of liability.

One of the questions that was so reserved was the question whether the contractor was entitled to be paid for work done under the existing conditions which work was of a totally different character and plan from that provided for in the original specifications. We do not see any escape from this position. Whether the contractor would or would not be entitled to compensation if the specifications had not been changed is one question. Whether it would be entitled to compensation, in view of the fact that the specifications were changed, is quite another question; but both questions were reserved in the rough instrument which defined the terms of the contract. In fact all questions were reserved; and the complaint forms a complete basis for a recovery on the ground of the changed work, which is fully set forth, even though it should be found that on any other basis no cause of action existed.

The technical point raised in reference to the vagueness of the assignments of error is of no im-

portance, in view of the fact that this is a demurrer. To have stated the errors specifically would be impossible where the judgment was that the complaint with its accompanying contracts, specifications and other documents failed to state facts sufficient to constitute a cause of action.

Respectfully submitted,

JAMES RUSSELL SOLEY,
HOWARD C. DICKINSON,
Of Counsel for Appellant and
Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

THE ATLANTIC, GULF AND PACIFIC COMPANY, appellant and plaintiff in error,
v.
THE GOVERNMENT OF THE PHILIPPINE ISLANDS. } No. 64.

APPEAL FROM AND IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR THE GOVERNMENT OF THE PHILIPPINE ISLANDS.

The facts are stated at length in the brief of plaintiff in error. Summarily they are as follows:

The plaintiff in error contracted to build in the harbor of Manila a rock and timber bulkhead and to fill in behind it with mud. The specifications which were incorporated into the contract contained the following clause:

DAMAGE TO BULKHEAD AND REVETMENT.

5. The contractor will be responsible for damages to the bulkhead and revetment

> arising from wave action or from pressure of the revetment against the timber structure; but if a break is caused by pressure resulting from the mud fill, the repairs to the structure will be paid for by the Government at the prices specified in the contract; provided that the specifications have been fully complied with. (Fol. 10.)

Work was duly begun on August 1, 1905 (fols. 6, 2), and proceeded until May 1, 1906, when the pressure of the inside fill displaced about 200 feet of the bulkhead and rock revetment. Through this break a large quantity of the fill ran out (p. 2). It is not alleged that this break was due to any negligence on the part of the Government.

On May 18, 1906, "a severe typhoon" occurred, and 1,800 feet more of the bulkhead and revetment were destroyed "by the pressure of the rock revetment and the wind and waves from the outside acting against the bulkhead and revetment, which, because of the escape of the hitherto noted fill, was without support from the inside." (Complaint, Par. IV, p. 2.)

The complaint also alleges that if the break of May 1 had not occurred, then no damage would have been done by the typhoon of May 18. (Paragraph VII, p. 2.)

The Government has assumed responsibility to make good the break of May 1; and this action was brought to charge it with the responsibility to make good the break of May 18.

At page 5 of the plaintiff's statement of facts it is suggested that the modification of the plan for the repairs by Exhibit D (transcript, pp. 19–21) was due to a decision by the Government that its engineering plan was defective. There is no basis whatever for this suggestion. Not a scintilla of evidence or allegation exists in the record to that effect. On the contrary the contract itself (at fol. 7) provides for modification of the project irrespective of any fault of the parties.

The position of the plaintiff in error is in substance that the Government is liable under clause 5, above quoted, for all proximate and natural consequences of the break of May 1, and that the break of May 18 was one of these consequences.

The Government controverts both these positions.

FIRST.

The liability of the parties is wholly contractual; it is to be gathered from article 5 of the original specifications, under which there was contemplated a division of responsibility for repair of breaks in the structure, the Government to be responsible for repair of breaks from pressure inside out and the contractors for repair of breaks from pressure outside in; it is wholly independent of negligence or rules of tort liability; and it did not extend beyond the immediate responsibilities as placed by the contract.

Both courts below held that by this contract the government did not assume liability for all the proximate and natural damages which might follow a break

from pressure of the mud fill, but only for repair of the particular break in the structure, and that the Government particularly was not liable under this contract for the action of the typhoon, since that was one of the responsibilities expressly assumed by the contractor.

I.

The language of article 5 shows that the Government agreed to pay only for such repairs to the structure as should be directly necessitated by pressue of the mud fill.

The natural and obvious meaning of the language of article 5 is the imposition by the parties on themselves of an arbitrary division of responsibility for breaks in the structure; that is to say, it contemplated that if the structure should fall one way, namely, outward, the government should be liable for the repair of so much, while if it should fall the other way, namely, inward, the contractors should be liable for the repair of that much. Thus, while the government became liable to repair the break of May 1 made by mud pressure from within, the contractors became bound to repair the break of May 18 arising from pressure of the typhoon.

Such was the view of the Supreme Court below as is seen from the following language of its opinion:

> It being conceded that the Government was to pay for the damage to the breakwater on May 1, the question presented to us is, Who is to stand the consequences of the typhoon of May 18–19? As a general principle, in the absence of express agreement, the contractor

must bear the loss from destruction of work under way, even in case of unavoidable accident, the rule in this jurisdiction being expressed in article 1589 of the Civil Code as follows:

"If the contractor is obliged to furnish the material, he must suffer the loss in case of destruction of the work before delivery, unless delayed by the party who was to accept."

In this instance, however, the parties have not left their liabilities to the general principles of law, but have made their own rule, dividing the responsibility, so that while the contractor should remain answerable for all damage from outside pressure on the structure from wave and rock revetment, the Government assumed charge of repairing the breaks caused by pressure from the inside fill.

It is obvious that the liability of the government was so defined as to arise only with respect to breakage due to the *existence* of inside pressure, whereas the break for the repair of which plaintiff is now claiming was due, by plaintiff's own admission (Par. IV of the complaint, fol. 2) to the *nonexistence* of the inside pressure.

That liability on the part of the government was contemplated only in the case where the breach in the structure was due to the *existence* of the inside pressure is still further to be gathered from the last paragraph of article 12 of the specifications:

All losses of dredged material from the fills, excepting those due to failure of the bulkheads from pressure of the mud fill, *as stated*

> *in article 5*, will be measured as carefully as conditions will permit and the computed amounts deducted from the statement for the final payment.

Still further does the language of the instrument show the narrow limits of the Government's liability. It did not agree to be responsible for all kinds of damage and remote consequences; it undertook to pay merely for "repairs to the structure." In other words, this was not intended as an agreement to insure against the consequences of a break from inside pressure.

The courts below recognized that the liability of the government was subject to these limitations. In the opinion of the Supreme Court it was said (fol. 34):

> In support of this view of the subject, it must be borne in mind that the liability of the government is narrowed by two important limitations: First, it does not extend to all kinds of damage, but only to repairs of any break in the bulkhead; and second, to such a break only when resulting from pressure from within and not from lack of such pressure. This furnishes a strong suggestion that what the parties had in mind was not the remote consequence of a damaged structure, but rather the immediate repair of any break that might occur, thus looking separately to each particular break and its immediate cause.

Plaintiff contends (brief, p. 24) that the effect of article 5 is that the first branch of the clause is a general provision imposing responsibility on the contractor for certain contingencies therein named, while the second branch is a controlling exception paramount to the first and intended to impose liability on the Government not only for the contingency which it in terms states, but also for the concurrent happening of that contingency and those contemplated by the first branch. In other words, plaintiff would amend article 5 to read as follows:

> The contractor will be responsible for damages to the bulkhead and revetment arising from wave action or from pressure of the revetment against the timber structure [excepting that where this damage arising from wave action or from pressure of the revetment would not have occurred but for the nonexistence of inside pressure due to a break caused by pressure resulting from the mud fill, the repairs shall be paid for by the Government], etc., etc.

If anything like this had been intended, the parties would have said so.

The exception, it is said, is to be read into article 5 because the wave action is a normal and natural phenomenon while the inside pressure is an artificial manifestation. But just as truly is the "pressure of the revetment" also an artificial manifestation, and yet the contract itself has put it on the same plane with the wave action and not within the so-called "exception."

In truth, although we may admit that wave action is a natural phenomenon, the important thing is that the parties expressly provided for it in the contract; its naturalness thereupon ceased to be important in the construction of the contract.

We will admit that the breakage was caused by inside pressure *and* wave action. Plaintiff can not deny that—indeed, he admits it as well. But he attempts to show that "breakage caused by inside pressure *and* wave action" is just the same in this case as "breakage caused by inside pressure" alone, and bases his attempt on tort cases, bringing up the doctrine of proximate cause, and insurance cases elsewhere herein distinguished. The former are clearly irrelevant, for the reason that they involve what the reasonable man would foresee as the consequences of particular facts, whereas here the parties themselves had foreseen the consequences of these facts and provided for them and for reasons discussed elsewhere.

The contract and the obligations arising therefrom on the happening of the events of May 1 and May 18 were immediately thereafter understood by the parties themselves to have the effect herein contended for.

The contractors themselves so understood the situation. They claimed to hold the government "responsible for all [damage] *on account delay repairing first break.*" (See Exhibit E, fol. 23, telegram from Lieutenant-Colonel Fish to Commissioner Forbes of

May 25, 1906.) They thus, at that time, recognized the futility of basing any claim for this damage on the terms of the contract and sought to rely on a claim that the government was negligent in delaying the repairs to the first break. That claim of intervening negligence by the government having now been abandoned, they have shifted their ground to a claim under a strained construction of clause 5.

The Government from the first construed the clause as it was construed by the courts below. Lieutenant-Colonel Fisk, in his telegram of May 25, said: "For most of typhoon damage I hold contractors responsible."

II.

The division of liability by article 5 had no relation to any delinquency under the contract nor to any negligence, and therefore the responsibility for remote consequences as in such delinquencies does not here exist, but only for the particular consequences contracted against, as in cases of insurance.

The ordinary rule of natural and probable cause is founded on the idea that a breach of duty continues its injurious effect into all consequences which ought to have been foreseen, but in this contract the division of liabilities made by article 5 has no relation whatever to any breach of duty or to any obligation to foresee; and so that rule of legal cause is not to be attached to this agreement. Before proceeding to discuss the authorities upon this distinction, it is desirable to point out the character of this clause of the contract, as being a limited insurance by direct

covenant and not a responsibility founded at all upon any breach of duty.

The mud filling (for pressure of which the Government is charged) and the rock revetment (for pressure of which the contractor is charged) stand exactly in the same case, both being alike under plans specified by the government and accepted by the contractor, and both being alike the work of the contractors, supervised and accepted by the government.

Indeed, by article 4 of the specifications (fol. 10), the maintenance of both the inside pressure and the outside pressure is made the duty of the contractor—

> 4. The timber bulkhead will be reenforced with a riprap revetment placed against the outside and deposited in such a manner and at such times as will protect the structure against failure from pressure of the mud filling.
>
> The completed revetment will have an elevation of seven (7) feet above mean low water, with a width of five (5) feet at the top and an outside slope of three (3) horizontal to two (2) vertical.
>
> During the process of filling the space behind the bulkhead, the riprap must be deposited to the full width of the section and must at all times be slightly above the level of the inside fill until the specified section is obtained (fol. 10).

Yet notwithstanding these identities of the real responsibilities as between the government and the contractor for the mud fill and the rock revetment, article 5 provides that breaks by the pressure of the

mud fill are to be made good by the government, and breaks by the pressure of the rock revetment are to be made good by the contractor.

The liabilities fixed by article 5 were, therefore, not fixed with reference to any breach of contract, for they are not at all coincident with any breach; nor is any breach here alleged.

Nor were these liabilities fixed with reference to any negligence, for negligence of either party might in any given case cause the break with which the contract charged the other party. The complaint here does not allege any negligence by the government.

In other words, the duties of repair are based upon direct covenant and not upon any breach of duty by negligence or otherwise; they are self-imposed by the parties as distinguished from duties imposed by law upon breach of contract or upon a tort.

The sole question, therefore, is the construction of the covenant, and before liability can be fixed on the Government here it must be found that the Government has consented to it, *and consented to it in the extent demanded*. We are not concerned with the extent to which the law of breach of contract, or the law of torts, carries liabilities unless the covenant here has accepted those standards.

This distinction is put by Mr. Justice Holmes in "The Common Law" thus:

> The liabilities imposed by contract are more or less expressly fixed by the agreement of the parties concerned, but those arising from a tort are independent of any previous consent of the

> wrongdoer to bear the loss occasioned by his act (p. 77). * * *
>
> As the relation of contractor and contractee is voluntary, the consequences attaching to the relation must be voluntary. What the event contemplated by the promise is—or, in other words, what will amount to a breach of contract—is a matter of interpretation and construction. What consequences of the breach are assumed is more remotely, in like manner, a matter of construction, having regard to the circumstances under which the contract is made. Knowledge of what is dependent upon performance is one of those circumstances. It is not necessarily conclusive, but it may have the effect of enlarging the risk assumed.
>
> The very office of construction is to work out from what is expressly said and done what would have been said with regard to events not definitely before the minds of the parties if those events had been considered.
>
> The foregoing analysis is believed to show that the result which has been reached by the courts on grounds of practical good sense falls in with the true theory of contracts under the common law (pp. 302–303).

The application of these guides by analogy to the present case is strong in favor of the Government, since here no question of the consequences attending a breach of contract is raised. We are concerned with the construction simply of an arbitrary covenant and the determination of the exact condition contemplated by it.

Did the Government then, by this contract, make itself in effect an insurer of the contractor against *all* consequences of pressure of the mud fill, even though such consequences directly resulted from a typhoon? To so hold would be to disregard the language of the contract and its effect of an arbitrary division of responsibility for specified consequences of accidental breaks to the structure. In this respect the case is to be distinguished from the general insurance cases cited by the plaintiff, where the insurer guarantees *all* damage consequent upon the event.

Upon such a question of construction of a contract a circumstance of first importance is, as Mr. Justice Holmes pointed out, the knowledge of the parties of what is dependent upon performance or upon contingencies expressly provided for. In this case the parties, having knowledge that the action of the waves or of the pressure from the revetment against the timber structure might enlarge an opening caused by the pressure of the mud fill, did not see fit to differentiate such a situation from any other operation of wave action. They contemplated that what they did provide should stand for all events touching breakage from wave action, pressure of the revetment or pressure from the inside fill; that is, the contractor should be liable for the former, the government for the latter, in any event.

That the parties actually foresaw that there might be losses of the mud fill, and hence a corresponding weakness of support to the bulkhead structure is clearly evident from article 12 of the specifications

which provides for the deduction from the statement for final payment of such amounts of the fill as should escape. Yet, to repeat, the parties did not change the terms fixing their responsibility; in the light of such foresight they still left the contractor responsible, with no exceptions or reservations, for breaks from outside pressure.

Looking at the question from another angle and distinguishing the case from those where the aim is simply to find the proximate cause of an unforeseen event, it is clear that the latter cases are not referred to with a clear understanding of their basis. The rule of proximate cause is applied in the usual case, where the actor has not, in fact, foreseen the consequences of his act at all, and he is held to those consequences only because he ought to have foreseen them as being a probable result of his action. But when at any point in the chain of cause and effect we reach a consequence actually foreseen and provided for by the parties before the event, the rule must cease and we are thrown on the agreement of the parties. So here, as the action of the typhoon was provided for by the contract, the rule ceases.

The principle and distinction are illustrated by the case of *Insurance Co.* v. *Transportation Co.* (12 Wall., 194), which is even stronger than the case at bar. A collision occurred at sea, causing a fire and a total loss. The total loss would not have occurred without the fire, but the fire would not have occurred without (and even was caused by) the collision. Nevertheless the insurer against fire was held liable

in spite of the fact that the proximate and natural cause of the damage, in the law of negligence, would have been not the fire but the collision. This the court said would still be the case, even if there had been a coinsurance against collision. So in the case at bar. The typhoon would not have damaged the wall without the preceding break from pressure of the mud fill; nor did the break from pressure of the mud fill damage the wall (that is the 1,800 feet) without the typhoon. The pressure of the mud fill here plays the part of the collision in the case cited, and the typhoon plays the part of the fire. Indeed our case is the clearer because the pressure of the mud fill did not *cause* the typhoon, whereas the collision did cause the fire and was therefore more plainly the proximate legal cause under the negligence rule.

In rendering the opinion in this case, Mr. Justice Strong said:

> There is, undoubtedly, difficulty in many cases attending the application of the maxim, but none when the causes succeed each other in order of time. In such cases the rule is plain. When one of several successive causes is sufficient to produce the effect (for example, to cause a loss) the law will never regard an antecedent cause of that cause, or the *causa causans*. In such a case there is no doubt which cause is the proximate one within the meaning of the maxim. But when there is no order of succession in time—when there are two concurrent causes of a loss—the predominating efficient one must be regarded as

> the proximate when the damage done by each can not be distinguished. Such is, in effect, Mr. Phillips's rule. And certainly that cause which set the other in motion and gave it its efficiency for harm at the time of the disaster must rank as predominant. In the present case, however, the rule hardly seems applicable, because the damage resulting from the fire and that caused by the filling of the steamer are clearly distinguished.
>
> It is true, as argued, that as the insurance in this case was only against fire, the assured must be regarded as having taken the risk against collision, and it is also true that the collision caused the fire; but it is well settled that when an efficient cause nearest the loss is a peril expressly insured against, the insurer is not to be relieved from responsibility by his showing that the property was brought within that peril by a cause not mentioned in the contract (p. 199). * * * Suppose these underwriters had insured the steamer against collisions and fire and had them reinsured against fire alone, as they might have done; would it have been a sufficient answer to a suit brought by them against their insurers that the fire which caused the steamer to sink was itself caused by a collision? No one will affirm that (p. 200).

An interesting case presenting the very situation put by Mr. Justice Strong as his supposititious case in the passage quoted is that of *Fuller* v. *Detroit Fire and Marine Ins. Co.* (36 Fed., 470). A steamer was insured by one set of companies against marine risks

alone, by other companies against fire alone. She stranded upon a rock and settled somewhat. By reason of these events a fire arose and resulted in a complete destruction of the steamer and her machinery. The master ascertained the total loss, and then calculated the proportions to be borne by the marine companies and by the fire companies according to the respective effects of the stranding and the fire on the total loss. The fire companies insisted that the loss was wholly by a peril of the sea (namely, the stranding), while the marine companies insisted that it was mainly a fire loss. The court held that the companies were liable in the proportions found by the master, even though the whole set of events was started by the stranding.

The same reasoning, in essence, is the basis of the case of *Beakes* v. *Phoenix Insurance Co.* (143 N. Y., 402), where the liability of the insurer was for loss by lightning, with an express exception of loss by windstorm. It was shown that lightning had struck the buildings, that immediately a high wind came up, and that damage was done. The court held that it was error to charge the jury that they might hold the insurer against the lightning for the whole loss if they found that the prostration of the buildings by the wind was the effect of the lightning or if they found that the lightning was the primary cause, though the wind might have added to the extent of the damage. The court held that the jury should have apportioned the recovery in the ratio of the *direct* loss from lightning to the *direct* loss from wind.

The case of *Warmcastle* v. *Insurance Co.* (201 Pa. St., 302) presented precisely the same state of facts and precisely the same question. The court made the same ruling, and repudiated the suggestion that its decision should be changed "if the building was weakened by the lightning stroke, and thus rendered more susceptible to the effect of the wind."

So in our case it is immaterial that but for the break of May 1 the typhoon would not have done the damage. The fact remains, the typhoon was the efficient cause on May 18 and it was a peril the responsibility for which was cast on the contractor.

The three cases cited by counsel for the plaintiff in error are all distinguishable from this case and the *Transportation Co.* case, *supra*.

The *Kellogg* case (94 U. S., 469) (in which also the opinion was written by Mr. Justice Strong) was a negligence case, and therefore involved liability by law for all the consequences of the negligence.

In the *Boon* case (95 U. S., 117) (also an opinion by Mr. Justice Strong) the question was whether a fire set by a Union officer to keep records out of the hands of an imminent invading force was within an exception reading: "*Provided always*, and it is hereby declared, that the company shall not be liable to make good any loss or damage by fire which may happen to take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power." Of course it was held that the exception applied. In order to bring this case into point with the case at bar, the contract would

have to be that A insured against fires set by Union troops in occupation and B insured against fires set by Confederates invading. If that had been the contract, the court would certainly not have held that B was liable on the facts stated.

The *G. R. Booth* case (171 U. S., 450) is distinguished plainly in the passage quoted in the brief of plaintiff in error (p. 16), where the basis of the decision is stated to be that the explosion and the inflow of the water were "concurrent," "without any appreciable interval of time," and the explosion was "the cause which set the water in motion." The converse principle of the distinction is stated by Mr. Justice Strong in the passage quoted above from the *Transportation Co.* case where he points out that "the causes succeed each other in order of time."

The *Transportation Co.* case and the other like cases above cited illustrate the clear-cut principle of law by which the application of the maxim, *In jure non remota causa sed proxima spectatur,* to insurance cases is differentiated from its application to cases of tort or breach of contract where the inquiry looks to the responsibility for a wrongful act. A well-considered note in 36 Am. St. Rep., 802, 807 (to the negligence case of *Gibson* v. *Delaware Co.*) puts this distinction exactly:

> The principle embodied in the maxim has been found useful in the solution of two distinct classes of cases: (1) Those which require the determination of the responsibility for a wrongful act, whether a ~~trust~~ or a breach of

> contract; and (2) those in which it is necessary to ascertain whether a catastrophe involving the loss of property, life, or bodily capacity has been caused by a peril the consequences of which have been assumed by an insurer. The fundamental difference between these classes is that in the latter the investigation ceases when the nearest cause adequate to produce the result in question has been discovered, while in the former the object is to connect the circumstance which is the subject of the action with a responsible human will (p. 808). * * *
>
> The maxim *in jure non remota causa sed proxima spectatur* is applied in a much more literal sense to cases in which the liability of an insurer is to be ascertained than to those involving a breach of contract or a tort. If the nearest efficient cause of the loss is one of the perils insured against, the courts look no further. (*General Mut. Ins. Co.* v. *Sherwood*, 14 How., 35.; *Howard Fire Ins. Co.* v. *Norwich, etc., Transportation Co.*, 12 Wall., 194.)

The case of *General Mut. Ins. Co.* v. *Sherwood* cited in this note is interesting and instructive as affording an illustration of the application of the maxim to both insurance contracts and to torts.

The theoretical basis of this distinction is analyzed further in an article by Mr. Prescott Hall in 15 Harvard Law Review, 541, where, in quoting the above note, he says:

> We may now sum up what we have learned of proximate cause as follows: From a legal

> point of view it is of two kinds (1), as in insurance cases; (2) responsibility for a wrongful act, whether in tort or contract. * * *
>
> In other words, the doctrine takes two forms. The first is in the field of mechanism or necessity and in the time process. We regard the continuous stream of causation in question, and go upstream in our search until we find a spring which can properly be called its source. The question is one of fact; of adequacy to produce the result in a mechanical sense.
>
> In the other field we are dealing with teleology, with purpose, with a human will, actual or constructive, with a world of freedom, not of necessity.

To apply this analysis to the present case: We have the result—the break in the bulkhead of May 18. We examine the field of fact surrounding that result. We find the nearest efficient contributing cause to be the typhoon of May 18. Investigation thereupon ceases. The inquiry then is, Who is responsible for that cause? We turn to the contract and we find that the contractor is expressly made responsible.

The fallacy in carrying the investigation further back and ascribing the result to the break of May 1 is the precise fallacy that lies in confusing the insurance cases with the class of cases in which responsibility springs from a wrongful act, and so involves a question of delinquency in the actor, with an obligation imposed by law to make good all consequences of that delinquency.

To sum up: In this case each of the parties by covenant assumed responsibility for certain results of certain causes and not for all results of all consequences following from those causes; and the controlling rule of construction is exactly stated in *Phillips on Insurance*, page 1134, as follows:

> In every insurance the risk on each peril is liable to be affected by every other peril; and *the party*, whether insurer or insured, *at whose risk a peril is must bear the loss by such peril, though it may have been indirectly* and incidentally *enhanced by another, for which he is not answerable*, where there is no express or implied stipulation, obligation, or condition against the subject being exposed to such other peril. (The italics are the author's.)

SECOND.

Even if the government had undertaken responsibility for all loss caused by the first break within any legal rule of proximate cause, it would not be liable here, for the complaint affirmatively discloses an independent, intervening, efficient, and proximate cause, namely, a "severe typhoon."

Assuming for the purpose of argument that the government was liable here for all the consequences of the first break, as if it had caused that break by breach of contract or as a tort-feasor, or as an insurer against all such consequences, still this complaint charges no liability, for it alleges that there intervened a "severe typhoon," and such an intervention was the legal proximate cause within the well-recognized authorities, including those cited on the plaintiff's brief.

It may be that the court will take judicial notice, as urged by the plaintiff in error, of the fact that "typhoons" are ordinary in Manila Bay, but the allegation here is of an extraordinary typhoon—a "severe" one. Such extraordinary interventions are plainly independent controlling causes within the rule.

THIRD.

The so-called supplemental agreement, Exhibit E, merely permitted the repairs to be made in the modified manner, but reserved the responsibility for their cost to be determined under article 5.

The plaintiff in error finally urges that the complaint is to be construed as a demand for compensation not for repairing this damage under article 5 but for independent work under an alleged distinct new contract formed by Exhibits E and D.

No such point was made in either court below, and upon this record and these assignments of error it should not be considered here.

The assignments of error are not specific, as required by rule 35; and while the discretion of the court reserved by that rule might well be exercised to examine whether the courts below were in error in the construction which their opinions show they gave to article 5, the indulgence should not be extended in favor of a point not only not suggested by the assignments, but never before suggested in any court and nowhere apparent in the record.

But on the merits the point is not sound, even if consistent with the complaint.

Exhibit E expressly makes the liability of the government to pay at all for the new work contingent upon its liability to make the repairs under article 5. No other meaning can be given to that exhibit.

Col. Fisk's telegram said:

> Contractors * * * wish to make repairs in manner authorized for first break, leaving settlement of liability to be determined later. (Fol. 22.)

and Commissioner Forbes replied:

> Governor-General and I approve authorizing contractors to proceed immediately to make repairs on lines indicated *with the understanding that all rights reserved in regard to adjudication of liabilities.*

The correspondence making up this Exhibit E is meaningless excepting on the theory that the contractors were to do the work in the way they "wished," but were not to be paid if the burden of repair was on them by virtue of article 5.

CONCLUSION.

The judgment should be affirmed.

Respectfully submitted.

WINFRED T. DENISON,
Assistant Attorney-General.

NOVEMBER, 1910.

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In the Supreme Court of the United States.

OCTOBER TERM, 1910.

THE ATLANTIC, GULF AND PACIFIC COMPANY, appellant and plaintiff in error,
v.
THE GOVERNMENT OF THE PHILIPPINE ISLANDS.
No. 64.

APPEAL FROM AND IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

SUPPLEMENTAL BRIEF FOR THE GOVERNMENT OF THE PHILIPPINE ISLANDS, FILED PURSUANT TO LEAVE GRANTED ON THE ARGUMENT.

I.

The following additional authorities are referred to in support of the Government's main proposition that, as the break of May 28 was due directly to wave action and pressure of the revetment, and as those specific causes are charged upon the contractors by the express terms of the contract, no further inquiry into prior contributing causes can be had.

Dudgeon v. *Pembroke*, L. R., 2 App. Cas., 284, 297; same case below in L. R. 9 Q. B., 581, 595.

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Wilson v. "*The Xantho*," L. R. 12 App. Cas., 503, 509, 511, 514.

Insurance Co. v. *Adams*, 123 U. S., 67.

Liverpool Steam Co. v. *Phoenix Insurance Co.*, 129 U. S., 397 at p. 438.

Northwest Transportation Co. v. *Ins. Co.*, 41 F. R., 793, 800 (C. C.).

2 *Arnould on Marine Insurance* (6 ed.), pp. 737, 753.

Hildyard, Marine Insurance, p. 269.

Phillips on Insurance, secs. 1136, 1137, in connection with sec. 1134, quoted at p. 22 of the principal brief.

In the Dudgeon case Lord Penzance stated the rule in a nutshell:

> A long course of decisions in the courts of this country has established that "*causa proxima et non remota spectatur*" is the maxim by which these contracts of insurance are to be construed, and that any loss caused immediately by the perils of the sea is within the policy, though it would not have occurred but for the concurrent action of some other cause which is not within it (p. 297);

and in the same case below Blackburn, J. (who also participated in the decision above), analyzed the facts in a manner equally applicable to the case at bar:

> It would be difficult to find a better example of what Lord Bacon calls the infinity of the "causes of causes, and their impulsion one on the other," than is afforded in this case. The ship perished because she went ashore on the coast of Yorkshire. The cause of her going

> ashore was partly that it was thick weather and she was making for Hull in distress, and partly that she was unmanageable because full of water. The cause of that cause, viz, her being in distress and full of water, was, that when she labored in the rolling sea she made water; and the cause of her making water was, that when she left London she was not in so strong and staunch a state as she ought to have been; and this last is said to be the proximate cause of the loss, though since she left London she had crossed the North Sea twice. We think it would have been a misdirection to tell the jury that this was not a loss by perils of the seas, even if so connected with the state of unseaworthiness as that it would prevent any one who knowingly sent her out in that state from recovering indemnity for this loss. (L. R. 9 Q. B., p. 514.)

II.

The point made by counsel for the plaintiff in his argument in reply, that in *Insurance Co.* v. *Transportation Co.* (12 Wall., 194), the risk of collision was on the shipowner, is exactly the fact that makes the case decisive here.

The insurer there was held liable for the loss from fire, even though the fire was caused by a collision, which was at the risk of the owner; and so it must be held here that the contractor is liable for the loss from wave pressure, even though that wave pressure should have been contributed to by the secondary effects of the mud pressure, which was at the risk of the Government.

III.

Finally, the fact must not be overlooked that the Government was not a full insurer against *all* effects of mud pressure, but only against specified effects, "the repairs to the structure" from "a break caused by *pressure resulting from the mud fill.*"

Respectfully submitted.

WINFRED T. DENISON,
Assistant Attorney General.

DECEMBER 7, 1910.

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for a public work with the Government of the Philippine Islands, are stated in the opinion.

Mr. James Russell Soley, with whom *Mr. H. C. Dickinson* was on the brief, for appellant and plaintiff in error:

A demurrer should not be sustained if, upon any fair and liberal interpretation, a cause of action can be implied from the averments of the complaint. *Lockhart* v. *Leeds*, 195 U. S. 427, 435; *Swift & Co.* v. *United States*, 196 U. S. 375, 395; *Coatsworth* v. *Lehigh Valley R. Co.*, 156 N. Y. 451, 457; *Olcott* v. *Carroll*, 39 N. Y. 436; *Naylor* v. *N. Y. C. & H. R. R. R. Co.*, 119 App. Div. 22, 28; *People* v. *New York*, 28 Barb. 240, 248; *Ketchum* v. *Van Dusen*, 11 App. Div. 332.

Plaintiff has pleaded a series of averments from which a cause of action may be clearly inferred. Even if freely admitted that the pleading is inartificially drawn and in some points is obscure and contains apparent contradictions, it clearly appears that the work which was the subject of this contract suffered serious injury by reason of the pressure of the fill upon the enclosing bulkhead and under the terms of the contract, the defendant, the Government of the Philippine Islands, was required to pay for the repairs to the structure so caused and that the work was done at reasonable and proper prices.

The break of May 1, 1906, due to the pressure of the fill upon the enclosing bulkhead, was the proximate cause of the subsequent injury to the work, for the repair of which compensation is demanded in the complaint.

The question here is that of proximate cause and the pressure of the fill is distinctly pleaded as the proximate cause of the injuries both of May 18–19 and of May 1. *Mil. & St. Paul R. Co.* v. *Kellogg*, 94 U. S. 469, 474; *Insurance Co.* v. *Boon*, 95 U. S. 117, 130; *Insurance Co.* v. *Tweed*, 7 Wall. 44; *The G. R. Booth*, 171 U. S. 450, 460.

The court will take judicial notice of familiar natural

phenomena and of natural laws which are matters of general knowledge, such as those of meteorology, physical geography, wave action and the prevalent liability to typhoons in the waters surrounding the Philippine archipelago, and known climatic conditions. *McGhee Irrigating Ditch Co.* v. *Hudson*, 21 S. W. Rep. 125; *The Conqueror*, 166 U. S. 110, 134. The interval of a fortnight or so between the proximate efficient cause and the ultimate result is of no importance. See *Insurance Co.* v. *Boon*, *supra*.

The liability of the defendant is not affected by paragraph 5 of the specifications.

The responsibility of the contractor for damages, arising from wave action as an independent cause, so far as it is based on paragraph 5 of the specifications, is expressly limited to certain specific forms of damage, and leaves the responsibility for other resultant damages subject to the general rule.

The supplemental agreements constitute an important additional support for plaintiff's cause of action.

The question of ambiguity is in the contract, and not in the pleading.

If the provisions of the contract are ambiguous and require interpretation they cannot be settled by demurrer. If failure to state a cause of action is due in any respect to latent ambiguities in the contract, plaintiff can introduce evidence to remove these ambiguities. *Clay* v. *Field*, 138 U. S. 464, 480.

Plaintiff cannot be deprived of the right to show whether he has a cause of action or not.

Mr. Assistant Attorney General Denison for the appellee, and defendant in error:

As the break of May 28 was due directly to wave action and pressure of the revetment, and as those specific causes are charged upon the contractors by the express terms of the contract, no further inquiry into prior contributing

causes can be had. *Dudgeon* v. *Pembroke*, L. R. 2 App. Cas. 284, 297; *S. C.*, L. R. 9 Q. B. 581, 595; *Wilson* v. *The Xantho*, L. R. 12 App. Cas. 503, 509; *Insurance Co.* v. *Adams*, 123 U. S. 67; *Liverpool Steam Co.* v. *Phœnix Ins. Co.*, 129 U. S. 397, 438; *Northwest Transp. Co.* v. *Insurance Co.*, 41 Fed. Rep. 793, 800; 2 Arnould on Mar. Ins., 6th ed., 737, 753; Hildyard, Mar. Ins. 269.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action upon a contract for an extension to the Luneta of the city of Manila. Both courts below decided for the Government, the defendant, upon demurrer to the complaint. Abridged, the allegations are these: A contract for the work was made on July 24, 1905. On May 1, 1906, about 200 feet of bulkhead and rock revetment were displaced by pressure from the inside fill and moved about twenty feet into the Bay of Manila, so that a large quantity of the fill that had been pumped behind the bulkhead escaped into the bay. On May 18, before the break could be repaired, a severe typhoon occurred, and the bulkhead and rock revetment, being without the support of the inside fill, were destroyed for about 1800 feet by the pressure of the rock revetment and the wind and waves from the outside, and a large additional quantity of the inside fill escaped. The question is which party must bear the last-mentioned loss. If the first break had not happened no damage would have been done by the typhoon. The plaintiff sets forth the cost of repairing the damages of May 18 and seeks to recover it in this suit.

The specifications of the contract contain the following:

"5. The contractor will be responsible for damages to the bulkhead and revetment arising from wave action or from pressure of the revetment against the timber structure; but if a break is caused by pressure resulting from

the mud fill, the repairs to the structure will be paid for by the Government at the prices specified in the contract; provided that the specifications have been fully complied with."

"12. . . . All losses of dredged material from the fills, excepting those due to failure of the bulkheads from pressure of the mud fill as stated in Article 5, will be measured as carefully as conditions will permit and the computed amounts deducted from the statement for the final payment."

On May 24 a supplemental contract was signed. It recited that the repairs made necessary by the break of May 1 ought to be paid for by the Government; that the original project was modified so as to fill the space that had given way with rock, with clay, etc., for the interstices; and that the change would either increase or diminish the cost. It then agreed that the plaintiff should make the repairs and the Government would pay the actual and reasonable cost, with certain qualifications, plus fifteen per centum, which last was to cover all other items, including profit. This referred to the first damage only. On the next day, May 25, the Government director telegraphed to Commissioner Forbes "For most of typhoon damage I hold contractors responsible; they claim Government responsible for all on account delay repairing first break, but wish to make repairs in manner authorized for first break leaving settlement of liability to be determined later. Repairs should be made at once, but in view of contract requirement . . . do not see how contractors can be authorized proceed before determination of liability." The answer approved "authorizing contractors to proceed immediately to make repairs on lines indicated, with the understanding that all rights reserved in regard to adjudication of liabilities." These telegrams were communicated to the plaintiff, and it was authorized to proceed to make repairs in the manner outlined in the agree-

ment of May 24. It did so and the Government now refuses to pay.

It will be understood that this case is in no way concerned with the possible difference in cost between the mode of repair adopted and that which might have been followed under the original contract. The question here is which party is responsible for the repairs, assuming no such difference to exist. We need not consider whether the effect of all that we have recited was or was not to substitute the new mode and new cost for the old as that which the parties left at risk when they agreed that the plaintiffs should go on and do the work. If the plaintiff should have any claim for the excess alone, if any, over the cost that would have been incurred under the original plan it is not suing for it here.

Both sides found their case on the division of losses made by the specification quoted. On the one hand, the accident would not have happened but for the pressure from the mud fill, on the other, the more immediate cause was wave action and the pressure of the revetment against the timber structure, the effects of which the contractor was to bear. We agree with the court below that the contractor must bear the loss. The question is not whether the responsibility of the Government might not have extended to the later consequences had it originally been a wrongdoer, and had it been sued in tort. The question is to what extent did the Government assume a risk which, but for the contract, would not have fallen upon it at all. The contract qualified the relation only cautiously and in part. If the break was caused by pressure from the mud fill the Government agreed to pay for repairs to the structure. That was all.

But for the addition in 12 quoted above it might be doubted whether 'structure' meant anything but the bulkhead and revetment. But Article 12 extends the Government liability to loss of dredged materials due to

such a break. It is suggested that the reason for the Government undertaking was that the plan was made by the Government engineers. It may have been. But the plaintiff was content to work upon that plan; it, not the Government, was doing the work, and it took the risk so far as the contract did not make a change. The Government could not be charged by it with negligence or with causing the first break. That was only something for repairing which the Government had promised to pay. Whatever the Government had not promised to pay for the contractor had to do in order to offer the completed work which it had agreed to furnish. The case is stronger for the Government than those upon policies of insurance where courts refuse to look behind the immediate cause to remoter negligence of the insured. *General Mutual Insurance Co.* v. *Sherwood*, 14 How. 351, 366; *Orient Insurance Co.* v. *Adams*, 123 U. S. 67; *Dudgeon* v. *Pembroke*, 2 App. Cas. 284, 295. Here, as we have said, the plaintiff cannot charge the defendant with negligence, the immediate event was one of which the plaintiff took the risk, on general principles of contract it took that risk unless it was agreed otherwise, and it does not matter to the result whether we say that we cannot look farther back than the immediate cause, or that the undertaking of the Government did not extend to ulterior consequences, not specified, of the break for repairing which it undertook to pay, but which it did not cause.

Judgment affirmed.

THE ATLANTIC, GULF AND PACIFIC COMPANY, *v.* GOVERNMENT OF THE PHILIPPINE ISLANDS.

APPEAL FROM AND ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 64. Argued December 6, 1910.—Decided December 19, 1910.

A Government contract for building a bulkhead in Manila provided that the contractor would be responsible for damages arising from wave action or pressure of the revetment against the timber structure, but that the Government would be responsible for break caused by pressure of the mud fill. There was a break owing to pressure of the mud fill and before it could be repaired there was a further damage caused by a typhoon but which would not have happened had the original break not existed. *Held*, as held by the courts below, that the contractor must bear the loss caused by the typhoon.

THE facts, which involve the construction of a contract